DIRECT BROADCAST SATELLITE SERVICE AND COMPETITION IN THE MULTICHANNEL VIDEO DISTRIBUTION MARKET

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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DIRECT BROADCAST SATELLITE SERVICE AND COMPETITION IN THE MULTICHANNEL VIDEO DISTRIBUTION MARKET

TUESDAY, DECEMBER 4, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order, a quorum being present.

The Committee on the Judiciary has the exclusive jurisdiction over laws pertaining to antitrust and effective competition in the national marketplace. As Chairman of this Committee, I have made it a priority to rigorously examine the proper implementation and enforcement of our antitrust laws in the context of our free market economy.

Aggressive business practices have always been a linchpin of America's economic success, and consolidating mergers can benefit consumers and the community. However, business practices that cross the line and violate our antitrust laws may stifle innovation, reduce consumer choice, diminish economic efficiency and lead to higher consumer prices.

Earlier this Congress I held a hearing on competition in the broadband high speed Internet service market. This week I have scheduled a hearing which will focus on the antitrust immunity enjoyed by major league baseball. More hearings are forthcoming, and each reflects this Committee's obligation to examine the role of our Nation's antitrust laws and their application in various facets of our economy.

Presently, nearly 90 million Americans receive multichannel video services, that is, services that provide them with many TV channels. The multichannel video industry, which is comprised of both cable and satellite video service distributors, has expanded entertainment options for millions of Americans and provided access to timely and important news information.

Last year, cable revenues alone exceeded $42 billion. The last several years have seen the meteoric growth of Direct Broadcast Satellite systems. DBS technology provides consumers throughout the United States with expanded digital viewing options by transmitting satellite signals directly to their homes.

Since 1994, the number of DBS subscribers has skyrocketed from zero to nearly 17 million. However, DBS satellite services provided millions of rural Americans with access to multichannel video programming once reserved to cable subscribers in urban areas. In my State of Wisconsin, for example, more than 30 percent of the homes have no access to cable.

Many of my colleagues on this Committee have heard complaints from constituents concerning poor cable service and higher cable bills; and DBS serves as a restraint on continuous cable rate hikes and customer service that leaves much to be desired. DBS will also provide thousands of rural communities with broadband Internet service, which is central to creating the telecommunications infrastructure necessary to recruit and retain high technology business.

Two companies, DirecTV and EchoStar, have been in the vanguard of the DBS revolution. In a few short years both companies have transformed the U.S. market for distribution services and dramatically enhanced competition and choice.

While these two companies are currently the only facilities-based DBS providers serving the United States, no one can argue that they have not been fierce competitors.

In late October, General Motors announced plans to sell DirecTV to EchoStar. The combined company will create a DBS operator with about 90 percent of the DBS market. The market dominance and potential anticompetitive consequences of such a merged company raise important questions that this Committee must address.

Because millions of rural homes do not have cable access, a combined company would create a single multichannel video provider in these areas. For millions more in urban areas, a merger will create a single provider in the DBS service market.

The purpose of today's hearing is not to prejudice the outcome of the Administration's pending antitrust review of the proposed DirecTV-EchoStar merger. We are legislators and not regulators. As legislators, we are committed to ensuring that our constituents are provided access to the highest quality products that our free market economy can provide; and today's hearing is consistent with that commitment.

I look forward to hearing from today's witnesses. And will now slowly recognize Ranking Member Conyers, while he is sitting down, for his opening remarks.

Mr. CONYERS. Thank you, Mr. Chairman. And good morning to the witnesses. We are always happy to see the former head of the FTC with us.

Is Rupert Murdoch testifying here today?

Chairman SENSENBRENNER. No, he is not. At least I don't see him in the audience.

Mr. CONYERS. Okay.

Chairman SENSENBRENNER. But he has a commanding presence, as you know, sir.

Mr. CONYERS. Well, how many people representing him are in the audience?

There are a number of questions that we wanted to explore today. Where is the benefit to the rural consumer in this discussion that we are gathered here to examine with these distinguished witnesses? And I wonder what process new EchoStar would have to go through to launch high-speed Internet service. Maybe we will find out.

I wonder if it is true that EchoStar was the only viable domestic candidate for this merger who submitted a competitive bid for DirecTV?

If DirecTV was purchased by News Corp., wouldn't they have an incentive to use their power to emphasize FOX programming on DBS satellite TV to the detriment of other programming?

How will other satellite TV companies be able to compete in terms of price and services? Might it not be nearly impossible for them to finance the technology required for effective competition, even locally?

Will anyone else be able to compete nationally? How can EchoStar effectively compete with local cable when its costs to the consumer are significantly higher even in urban markets where the larger markets usually lower prices?

For example, price start-up costs, equipment costs, monthly service, compared to channel services. Does either company own an essential facility that is shared by other satellite TV companies or cable companies?

Are there any customers currently served by either company that will not be served by the new company?

How much does each company currently charge? Will the uniform price be less than both the current prices?

Now, Ed has said that after the merger they will have bandwidth to serve local programming to 100 communities nationwide, reaching 85 percent of households. But would those not be primarily larger markets? Will they be providing local programming to rural customers?

We will stay tuned and we will see how many of those things get answered this morning.

I thank you, Mr. Chairman.

Chairman SENSENBRENNER. Without objection, all Members' opening statements will be placed in the record at this point.

[The prepared statement of Mr. Sensenbrenner follows:]

PREPARED STATEMENT OF THE HONORABLE F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

A quorum being present, the Committee will come to order. The Committee on the Judiciary has exclusive jurisdiction over laws pertaining to antitrust and effective competition in the national marketplace. As Chairman of this Committee, I have made it a priority to rigorously examine the proper implementation and enforcement of our antitrust laws in the context of our free market economy. Aggressive business practices have always been a linchpin of American economic success and consolidating mergers can benefit consumers and the economy. However, business practices that cross the line and violate our antitrust laws may stifle innovation, reduce consumer choice, diminish economic efficiency, and lead to higher consumer prices.

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The last several years have seen the meteoric growth of Direct Broadcast Satellite systems. DBS technology provides customers throughout the United States with expanded digital viewing options by transmitting satellite signals directly to their homes. Since 1994, the number of DBS subscribers has skyrocketed from zero to nearly 17 million. Moreover, DBS satellite service has provided millions of rural Americans with access to multichannel video programming once reserved to cable subscribers in urban areas. In my state of Wisconsin, for example, more than 30 percent of homes have no access to cable. Many of my colleagues on this Committee have heard complaints from constituents concerning poor cable service and higher cable bills, and DBS serves as a restraint on continuous cable rate hikes and customer service that leaves much to be desired.

DBS also will provide thousands of rural communities with broadband Internet service, which is central to creating the telecommunications infrastructure necessary to recruit and retain high-technology businesses.

Two companies, DirecTV and EchoStar, have been at the vanguard of the DBS revolution. In a few short years, both companies have transformed the U.S. market for distribution services and dramatically enhanced competition and choice. While these two companies are currently the only “facilities-based” DBS providers serving the United States, no one can argue that they have not been fierce competitors.

In late October, General Motors announced plans to sell DirecTV to EchoStar. The combined company will create a DBS operator with around 90 percent of the DBS market. The market dominance and potential anti-competitive consequences of such a merged company raise important questions that this Committee must address. Because millions of rural homes do not have cable access, a combined company would create a single multichannel video provider in these areas. For millions more in urban areas, a merger will create a single provider in the DBS service market.

The purpose of today’s hearing is not to prejudice the outcome of the Administration’s pending antitrust review of the proposed DirectTV/EchoStar merger. We are legislators, not regulators. As legislators, we are committed to ensuring that our constituents are provided access to the highest quality products that our free market economy can provide, and today’s hearing is consistent with this commitment. I look forward to hearing from today’s witnesses and now recognize Ranking Member Conyers for his opening remarks.

Congressional
Research
Service

Memorandum November 29, 2001

TO: House Judiciary Committee
Attention: Will Moschella

FROM: Marcia S. Smith MSS
Specialist in Aerospace and Telecommunications Policy
Resources, Science, and Industry Division

SUBJECT: Background on Direct Broadcast Satellite (DBS) Services

Pursuant to your request, in preparation for your hearing on competition in the Multichannel Video Programming Distribution (MVPD) market, the following memorandum provides information on the technical aspects of providing direct broadcast satellite (DBS) services, and on the history of the evolution of DBS in the United States. The time constraints imposed by your request preclude a thorough examination of these matters, but we hope the following will suffice. If we can be of further assistance, please don't hesitate to call (7-7076).

Satellite Television: Direct-to-Home (DTH) and Direct Broadcast Satellites (DBS)

Receiving television signals at home via satellite is formally called Direct-to-Home (DTH) satellite services. DTH encompasses the use of satellites operating at different frequency bands and power levels, which determines the size of the receiving antenna ("dish") required on the ground. One specific type of DTH satellite service is referred to as DBS—Direct Broadcast Satellite. DBS satellites transmit their signals to homes at 12.2-12.7 Gigahertz (GHz)[1], a portion of the "Ku-band" specially designated for that service by the International Telecommunication Union (ITU).[2] DBS satellites are allowed to operate at high power levels because the band was allocated specifically for their use. Consequently,

[1] 1 hertz is one cycle per second. 1 Gigahertz (GHz) is one billion hertz.

[2] The ITU is a specialized agency of the United Nations tasked with allocating radio frequencies for use throughout the world. Such international coordination is required to ensure that systems do not cause harmful interference with each other. ITU members (essentially all the members of the United Nations) meet periodically at World Radio Conferences to determine how to make these allocations. The ITU divides the world into three regions: Region 1 is Europe and Africa, Region 2 is North and South America, and Region 3 is Asia, Australia, and the South Pacific. The ITU frequency allocations for DBS mentioned in this report are for Region 2 only.

the size of the receiving dish can be comparatively small (about 18 inches). Other DTH satellites operate or have operated at "C-band" (4-6 GHz) and at a lower portion of the Ku-band (11.7-12.2 GHz).[3] The C-band satellites are low power and require large "backyard" dishes, 4-8 feet in diameter. DTH satellites using the 11.7-12.2 GHz band are medium-power and use approximately 30 inch dishes. With the emergence of DBS and its smaller dishes and greater number of channels (offering more programming variety), the number of C-band customers in the United States is diminishing. Medium-power DTH services no longer are offered. The one company, Primestar, that offered such services is no longer in business. According to SkyReport [http://www.skyreport.com/dth_us.htm], as of October 2001, there are approximately 894,000 C-band customers (down from 1.2 million a year earlier), and just over 17 million DBS customers (up from 14 million a year earlier) in the United States.

Satellite television began in the United States in the 1970s when broadcast television networks and cable programmers first began using satellites to transmit programming to affiliates and cable system operators around the country. The signals were not encrypted and anyone with a suitable antenna could receive the signals. As the number of C-band dish owners grew, however, the networks and cable programmers began encrypting the signals, denying free viewing to C-band dish owners. The broadcast networks objected to viewers watching their "network feeds," which included footage not ordinarily aired and did not include local advertising. Cable programmers objected to viewers watching their programming without paying subscription fees. As time passed, some companies, such as Primetime 24, began acquiring signals from network or cable television sources, packaging them, and offering them via satellite to C-band consumers for a fee. Copyright issues associated with this retransmission of television signals led to congressional passage of the 1988 Satellite Home Viewer Act (SHVA), which was amended in 1994 and 1997. Once DBS companies began offering services, they also were subject to the provisions of SHVA and were not permitted, *inter alia*, to retransmit network broadcast television programming except under certain circumstances. In 1999, however, Congress revised the law, passing the Satellite Home Viewer Improvement Act (SHVIA) that permits DBS satellites to retransmit local network programming back into the same market area. The history of and debate over SHVA and SHVIA and continuing issues associated with SHVIA are outside the scope of this memorandum and will not be discussed further (see CRS Report RS20425).

How DBS Works

DBS services are provided by transmitting signals from an Earth-based ground station up to a satellite and back down to millions of Earth-based receiving antennas ("dishes"). Television signals are transmitted from the ground station to "transponders" aboard the satellite. The transponders receive the signals, boost their power, change their frequency, and retransmit them down to the receiving dish at a consumer's home, boat, recreational vehicle, or similar location. The dish is connected to a "set-top box" which is itself attached to a television set. The television signals are encrypted ("scrambled") and in digital form. The set-top box decrypts the signals, and since most TV sets today are analog, converts the signal from digital to analog.

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[3] Users of these satellite services are sometimes referred to as Home Satellite Dish (HSD) owners.

DBS Frequencies and Orbital Slots. As noted, the ITU is responsible for allocating radio frequencies for use around the world. Recognizing the potential of direct-to-home satellite services, the ITU created a new Broadcast Satellite Service (BSS) in 1977 for this new type of service. The ITU designated two bands in Region 2 for BSS: 12.2-12.7 Gigahertz (GHz) for transmitting signals from the satellite to Earth (the "downlink"), and 17.3-17.8 GHz for transmitting signals from Earth to the satellite (the "uplink"). Although the ITU uses the BSS designation, the term Direct Broadcast Satellite (DBS) is more common.

At the time when the ITU was developing the DBS plan, all commercial communications satellites were placed in geostationary orbit[4] (abbreviated either GEO or GSO). At the power levels approved for DBS, the ITU determined that satellites serving the same location (e.g., a particular country) would need to be spaced at 9° intervals in geostationary orbit in order to prevent interference. The ITU created a plan whereby countries were allocated specific locations ("slots") in GEO from which DBS could be provided. The United States was allocated eight slots, of which three provide coverage of the full continental United States (CONUS). The eight orbital locations (in degrees West longitude) are: 61.5°, 101°, 110°, 119°, 148°, 157°, 166°, and 175°. The locations at 101°, 110°, and 119° are those that provide full CONUS coverage. Other countries, such as Mexico, Canada, Brazil, and Argentina, were allocated different slots in the same portion of GEO.

The ITU's creation of the "planned band" for DBS was a departure from its traditional "first-come, first-served" approach to orbital slot allocation. It chose to create a comparatively rigid plan in an attempt to ensure that all the countries around the world, not just those that are leaders in satellite technology, would have an opportunity to launch their own direct broadcast satellites. The decision has been criticized over the years for stifling technological development of DBS satellites. Some argue, for example, that more efficient satellites might have been developed that would not require so many degrees of separation if the ITU had not created a regulation that DBS satellites must be 9° apart.

When the Federal Communications Commission (FCC) began proceedings to issue licenses for operating DBS services in the United States,[5] it subdivided the 12.2-12.7 GHz band into smaller bands, which the FCC calls "channels."[6] Thus the FCC licenses are issued based on a certain number of channels at each orbital slot, which corresponds to the number of transponders that can be operated at that location. The number of transponders on a particular satellite varies depending on the satellite's design, and the number of satellites

[4] Geostationary orbit (GEO) is a unique orbit that exists above the Equator at an altitude of 22,300 miles (35,800 kilometers). A satellite placed in that orbit retains a fixed position relative to a point on Earth and thus is very useful for applications such as communications.

[5] The ITU allocates frequencies on a global basis. Thereafter, individual countries assign use of those frequencies within their own borders. In the United States, the FCC assigns frequency usage to non-government users; the National Telecommunications and Information Administration (NTIA), part of the Department of Commerce, assigns it to government users.

[6] This use of the word channel in this context should not be confused with a television channel. Several TV channels can be transmitted through a single transponder.

located at any of the orbital slots can vary as long as they do not cause harmful interference. Each satellite can provide signals to any dish within the satellite's coverage area (its "footprint"). Thus, satellites in the three full CONUS orbital slots can transmit TV programming or provide data services to any household in the continental United States that has a corresponding dish. Satellites located in the other five U.S. slots can service only portions of the country.

Satellites can use "spot beams" or "full CONUS beams" to cover different areas within the satellite's footprint. Full CONUS beams obviously cover the entire continental United States. Spot beams cover smaller areas, but are more efficient because the transponder's frequency band can be reused many times. Programming intended to be viewed nationwide is more efficiently distributed using a full CONUS beam. Programming intended for local consumption is better distributed by spot beams.

As noted, at the time the ITU created the DBS plan, all commercial communications satellites were placed in GEO. In the 1990s, however, a number of companies came forward with satellite system designs based on "non-geostationary" (NGSO) orbits—basically any Earth orbit other than GEO. With the strong demand for frequencies to offer new services, the ITU reviewed its decision to reserve the 12.2-12.7 GHz band for DBS downlinks, and decided that NGSO satellites could operate in that band as well, as long as they did not pose any interference threat to DBS satellites.[7] Most of the companies proposing NGSO services in that band are focusing on data services, such as Internet connections, although a few have proposed systems that would offer satellite TV as well. The downturn in the telecommunications market in the United States, however, has made it difficult for these fledgling systems to obtain financing, so their futures are uncertain.

Another solution to coping with the limited number of DBS slots is to use satellites that operate at other frequencies. Only DBS satellites—i.e., those operating as 12.2-12.7 GHz—are subject to the ITU's DBS slot allocation plan. Some companies are planning to use GEO satellites operating at higher frequencies in the "Ka-band" (20/30 GHz). The key is whether there is sufficient demand for additional DTH services to enable those companies to find investors to finance construction and operation of the systems.

Trying to win approval to use another country's DBS slots for serving the United States is another approach, although it poses significant issues. In 1996, TCI and Telquest Ventures Inc. sought FCC approval to use Canadian satellites in Canada's DBS slots to provide services to the United States. The satellites would have been licensed by Canada, but the FCC had to approve "landing rights" (permission to transmit the signals to receiving antennas) in the United States. The Canadian government had indicated support for the proposal, but never formally approved it. The FCC decided that it could not approve U.S. landing rights until the Canadian government had granted licenses to build and operate the satellites. The issues were quite complex, involving, *inter alia*, disputes between the two countries over the distribution of U.S. television programming in Canada. Another U.S.

[7] In the United States, several companies (Northpoint and its BroadwaveUSA subsidiary, Pegasus, and MDS America) are seeking FCC permission to use the 12.2-12.7 GHz band for *terrestrial* TV transmissions as well. The FCC is studying potential interference issues.

company, WSNet, now is reportedly proposing something similar. It is a wholesale distributor of TV programming to multiple dwelling units and small cable companies. According to the November 28th issue of SkyReport, WSNet is seeking permission from the FCC for landing rights from the Canadian DBS slots to "enhance its rural market wholesale digital satellite service" in response to the proposed merger of EchoStar and DirecTV. In addition to political issues, technical issues could come into play because of potential interference if one country's slot is used to service another country. One of the premises behind the ITU's plan is that the slots are designated for use by specific countries to avoid such interference.

U.S. DBS Companies

Since the establishment of DBS by the ITU, the FCC has issued nine DBS licenses, but only two companies have launched DBS satellite systems so far: DirecTV, a subsidiary of Hughes, which began service in 1994; and EchoStar, which initiated its DISH Network service in 1996. Two other organizations, Pegasus Communications, and the National Rural Telecommunications Cooperative (NRTC), have offered DBS services to consumers, but they redistribute DirecTV's programming. They have not, as yet, operated their own satellite systems, though both have indicated interest in doing so.[8]

Due to the time constraints imposed by your request, this memo cannot detail the complex dynamics that have been involved in the assignment, transfer, and auctioning of DBS licenses over the past few years. Briefly, the FCC awarded licenses to nine companies: Advanced Communications, Continental Satellite Corp., Direct Broadcast Satellite Corp. (DBSC), DirectSat, DirecTV, Dominion Video Satellite, EchoStar, Tempo Satellite Inc., and United States Satellite Broadcasting (USSB).

Four companies still hold licenses: Dominion, DirecTV, EchoStar, and R/L DBS (which acquired Continental). According to the FCC, the R/L DBS license for 11 channels at 61.5° is being used by Echostar under an FCC grant of Special Temporary Authority; R/L DBS still plans to build its own satellite to use those channels. Dominion has a license for eight channels, also at 61.5°. It leases eight transponders from Echostar, and subleases six of them back to EchoStar, using the other two for its own religious programming (Sky Angel).

As for the other five licensees, the FCC revoked the license for Advanced Communications because it could not meet FCC's due diligence requirements. DirectSat and DBSC merged with EchoStar. USSB offered premium programming via DirecTV satellites and eventually merged with DirecTV. Tempo's license was transferred to DirecTV when

[8] Pegasus has won an FCC license for a Ka-band satellite, and NRTC lobbied strongly for the LOCAL Act in 2000 that established a loan guarantee program for companies to provide local television in markets not being provided that service by the DBS companies. NRTC indicated its interest in building a satellite system for delivering local television at that time. (For information on the LOCAL Act, see CRS Report RS20425.) In addition, a company called Local TV on Satellite has proposed building a Ka-band system for delivering local television via satellite.

DirecTV purchased Primestar, the medium–powered DTH service owned by a consortium of cable companies.[9]

As noted, in 1995 the FCC revoked the license it had awarded to Advanced Communications for channels at 110° and 148°. FCC auctioned those channels (previously the DBS licenses had been awarded for free). MCI paid $682.5 million for 27 channels at 110°, one of the full CONUS slots. EchoStar paid $52.3 million for 24 channels at 148°. Later, MCI's business plans changed and it decided not to enter the DBS market. Its license for the channels at 110° was transferred to EchoStar in 1999 as part of a business arrangement.

Thus, today, DirecTV and EchoStar have all the licenses to operate at the three full CONUS slots. A table, provided by the FCC, showing how many channels are assigned to each licensee at each orbital location follows.

DBS Channel Assignments by Orbital Location

Permittees/ Licensees	Total Channels	175°	166°	157°	148°	119°	110°	101°	61.5°
DirecTV	46					11+	3+	32+	
EchoStar	107	22			24+	21+	29+		11+
R/L DBS	11								11*
Dominion	8								8**
Unassigned	84	10	32	32	8	0	0	0	2*

+ Operational.
* Used by EchoStar pursuant to a grant of Special Temporary Authority.
** Dominion leases eight transponders on EchoStar III. EchoStar holds a license for 11 of the 32 DBS frequencies at 61.5 degrees. Concurrent with the Dominion lease, EchoStar is subleasing six of the transponders back from Dominion, subject to the control of Dominion as the licensee. Dominion (Sky Angel) subscribers may also receive EchoStar (DISH Network) programming using the same 18-inch DBS antenna.

Source: This table, including the footnotes, was provided to CRS by the FCC, November 29, 2001.

The three orbital slots within the darker lines are those that provide full coverage of the continental United States. The orbital slot designations are in degrees West longitude.

[9] Tempo was owned by TCI, a Primestar partner. The Tempo license and two satellites were part of the deal for DirecTV buying Primestar.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, I have concerns about EchoStar's proposed merger with DirectTV.

By combining DirecTV with EchoStar, a Direct Broadcast Satellite (DBS) monopoly provider is created that owns 100% of the spectrum capable of serving the United States. Due to lack of competition, EchoStar would have less incentive to develop innovative technology, program offerings and services.

American consumers would go from three competitive options to two. And, in markets where cable is not available, as in some parts of Texas, millions of Americans would face a monopoly provider.

For those in rural areas, DBS is the only source of digital television service. The number of consumers in markets served by a monopoly provider is likely to increase in rural markets, as the small cable systems that serve those markets lack the resources to remain competitive and therefore may go out of business.

EchoStar claims that it needs access to 100% of the DBS spectrum serving all 50 states to provide local broadcast signals to additional markets. EchoStar and DirecTV both could provide more local-into-local service but have chosen not to do so. Even with the merger, over half of the nation's 210 local television markets still will be left without local service.

One piece of the pie is left out of the merger debate. A company called Northpoint Technology has developed and patented a wireless technology that reuses the satellite spectrum. It is waiting for its licenses in order to bring new service to rural America.

Northpoint systems will carry all local TV channels in all 210 local television markets. DBS providers serve only the top 42 markets, and with the merger would only carry the top 100. Also, Northpoint's digital networks will offer broadband access to the Internet, reaching areas not served by cable or DSL.

If EchoStar and DirecTV want to eliminate competition in the satellite industry, I would hope that they'd be willing to support introducing a new facilities-based competitor in the multichannel marketplace.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you Chairman Sensenbrenner and Ranking Member Conyers for holding this very important hearing on H.R. 3295, the "Help America Vote Act of 2001."

Today, we consider one of the most important and pervasive issues in America: electoral reform. I look forward to the commentary and recommendations from our distinguished panel of witnesses: Cleta Mitchell of Foley & Lardner, James Dickson of the American Association of People With Disabilities, John R. Lott Jr. of the American Enterprise Institute, Philip D. Zelikow of the National Communications Federation, and Lloyd J. Leonard of the League of Women Voters of the United States.

Few issues are as central to our democratic principles and freedom. Four decades ago, thousands of Americans risked their lives and ways of life challenging the prevailing institutional systems of discrimination in this Nation that prevented millions of Americans from exercising their sacred and fundamental right to vote.

Many who rose up on legal, constitutional, and moral grounds lost their lives in the civil rights and voting rights movements. Their sacrifice is a reminder to us all that the freedoms and liberties that we all enjoy in this great country did not and will not come without a price. The widespread voter disenfranchisement of the 2000 presidential election continues to remind us of this.

According to a report issued by Caltech and MIT, as many as 6 million Americans were denied their fundamental right to vote and to have their votes counted. More recently, in last month's Houston Mayoral runoff in Harris County, Texas, which I represent, a computer problem cut off access to the county's voter registration database. As a result, many voters were either turned away from the polls or were told by election officials that they could only vote if they had voter registration cards. Many could not vote at all.

This is truly horrifying in any democracy, but is particularly shameful in America. In order to rectify these egregious irregularities in process, it is patently clear that the nation's voting procedures, riddled with inequities and systemic barriers, must be corrected at all costs.

The 2000 presidential election revealed a plethora of barriers to voting. In NAACP hearings on voting irregularities we heard testimony from law enforcement, poll workers, educators, civil rights organizations, state and federal legislators, and disenfranchised voters recounting the following:

1. That citizens who were properly registered were denied the right to vote because election officials could not find their names on the precinct rolls;
2. That registered voters were denied the right to vote because of minor discrepancies and clerical errors;
3. That first-time voters who sent in voter registration forms prior to the state's deadline for registration were denied the right to vote because their registration forms were not processed;
4. That African-Americans voters were singled out for criminal background checks at some precincts and that one voter who had never been arrested was denied the right to vote after being told that he had a prior felony conviction;
5. That African-American voters were required to show photo identification while white voters at the same precincts were not subjected to the same requirement;
6. That voters who requested absentee ballots did not receive them but were denied the right to vote when they went to the precinct in person on Election Day;
7. That hundreds of absentee ballots of registered voters in various counties throughout the nation were improperly rejected by the Supervisor of Elections and not counted;
8. That African-American voters who requested assistance at the polls were denied assistance;
9. That African-American voters who requested the assistance of a volunteer to translate the ballot for limited proficient voters were denied such assistance.

Beyond these egregious voting irregularities, millions of Americans were denied their fundamental right to vote simply because they were unable to vote due to prior work commitments. In fact, the great untold story in the last election, and in most elections in America is the voting disparity that exists between those who can afford to take time off work to vote and those who cannot. Moreover, this perpetual disparity has caused a voting gap that threatens the very fabric of our representational democracy and has challenged Congress to legislate a solution that addresses this great disparity.

In August, 2001 the non-partisan National Commission on Federal Election Reform, also known as the "Ford-Carter Commission" attempted to remedy this problem when it issued its policy recommendations with respect to electoral reform. Its premature recommendation for an Election Day holiday was as follows: "in evenly numbered years the Veterans Day national holiday be held on the Tuesday next after the first Monday in November also serve as our Election Day." I believe there is a better and different approach and I have affered legislation to change to that approach.

I take exception with this recommendation. It is because of the sacrifices made by our Veterans for freedom, the flag, and the American people that we are today able to vote. Their sacrifice, particularly in light of the September 11 attacks and the ongoing war on terror, reminds us that we cannot take our freedoms and democracy for granted. As such, this important day should be preserved and honored at all costs.

That's why, on March 7, 2001 I introduced H.R. 934 which ensures that the fundamental right to vote is guaranteed to every citizen of the United States without interference with Veterans Day. H.R. 934 establishes Presidential Election Day on the Tuesday next after the first Monday in November in 2004 and each fourth year thereafter, as a legal public holiday so that all Americans can vote irrespective of their economic status. Importantly, it also recognizes the sacrifices of Veterans and the sanctity of Veterans Day by ensuring that Election Day never falls on Veterans Day.

The legislation before us today, H.R. 3295, is one of numerous efforts to reform a system which clearly needs fixing. As the Chair of the Congressional Election Reform Caucus, I applaud such efforts. However, I am afraid that this particular legislation, H.R. 3295, contains numerous problematic provisions and falls short of the kind of comprehensive legislation that would ensure that every American's vote is cast and counted.

In fact, in many respects, this bill in its current state may actually reverse voting protections as provided under current law. For example, it fails to ensure that Americans are allowed to cast provisional ballots where their eligibility is questioned at the polls. It fails to ensure, regardless of race or ethnicity, that the voters have access to voting machines that perform accurately. It deviates from current federal law allowing for voter names to be "purged" from the voting rolls, and fails to provide such protections ensured by computerized statewide voter registration lists. Finally, it fails to ensure that voters with disabilities are adequately assured of their voting rights, and fails to ensure that all voters have access to machines that are easily and universally operable.

In the alternernative, I am glad to lend my support to the recent bi-partisan efforts of Senators Dodd and Daschle, and Representatives Conyers and Morella in their recent introduction of S. 565/H.R. 1170, the "Equal Protection of Voting Rights Act". This bill would provide greatly needed grants to states and localities for federal election administration systems that are part of state plans developed by the Governors and approved by the U.S. Attorney General.

States would have to adhere to mandatory uniform national standards for: accessibility, nondiscriminatory standards addressing election technology, provisional voting and sample ballots, and provide funds for voter education and worker training programs. A bipartisan commission would examine issues, develop "best practices" and issue a report within one year.

The report would include consideration of the best ways for the federal government to permanently assists state and local governments. This legislation is deserving of all of our support.

While I thank the sponsors of H.R. 3295 for their efforts to reform our badly corrupted election system, I'm afraid that their bill fails where others succeed.

For the forgoing reasons, I cannot support H.R. 3259 and urge my colleagues to also oppose it.

Thank you.

Chairman SENSENBRENNER. Also, without objection, the letter from Sophia Collier, president of Broadwave, USA; a letter from Patrick Gottsch, president of RFD Communications; and information from the National Association of Broadcasters will be included in the record following the testimony and questions and answers of the witnesses today and any material that they wish to submit.

Without objection, this hearing's record shall remain open to receive additional information or answers to questions requested of the witnesses.

Today's witnesses are Charles Ergen, the CEO of EchoStar Communications Corporation; Robert Pitofsky, professor at the Georgetown University Law School and former Chairman of the Federal Trade Commission; Bob Phillips of the National Rural Telecommunications Cooperative; and Gene Kimmelman of the Consumers Union.

Could you all please stand, raise your right hand and I will swear you in.

[Witnesses sworn.]

Chairman SENSENBRENNER. Let the record show that each of the witnesses answered in the affirmative.

Chairman SENSENBRENNER. I would like to ask each of the witnesses to summarize their statements in 5 minutes or so. Without objection, all written material, including testimony in total, will be included in the record following your prepared statement.

Mr. Ergen, you are first.

TESTIMONY OF CHARLES W. ERGEN, CHAIRMAN AND CEO, ECHOSTAR COMMUNICATIONS CORPORATION

Mr. ERGEN. Thank you, Mr. Chairman, Mr. Conyers, distinguished Members of the Committee. Thank you very much for inviting EchoStar to testify today about video competition and the proposed merger of EchoStar Communications and Hughes Electronics Corporation. I believe that this will promote competition among the multichannel video providers and offer much-needed benefits to consumers.

I would like to first take a minute and give you a little background on EchoStar. We started back in 1980 selling big dishes primarily to farmers and ranchers in rural America. We had one problem. They cost $20,000 and they were about 10 feet in diameter.

By 1996, we realized that we had to get—to compete against cable. A big dish for $20,000 in your back yard in a city wasn't going to be effective. And we have brought the cost down to below $1,000, but we had to bring the size down. So we launched a small dish service called DISH Network, a little pizza-sized dish and brought the cost down to about the price of a VCR. Then and only then could we reach our dream of competing on a level playing field with cable.

We had some advantages back in those days. We were the—only us and DirecTV and others were the only digital satellite providers, and our market took off. Over the last 6 years we have acquired about just over 6 million subscribers, or about 6 percent of the consumers in America.

We have been rated number one in customer service 2 of the last 3 years in J.D. Power; and this year, in the University of the Michigan Business Survey, among consumers. We have spent billions of dollars and launched six high-powered satellites with two more high-powered satellites scheduled to launch sometime next year.

The first step in really analyzing this merger is, what market are we in? Many people suggest that we are only in the satellite television business market. In other words, we only compete against satellite television providers. Nothing can be further from the truth. We compete in the MVPD market, in other words the pay television market, and that includes, among others, cable operators, SMATV operators, phone companies and overbuilders.

In that particular market, we only have, between DirecTV and DISH Network, 17 percent of the market or about 15 million homes between the two companies. That compares against the entrenched incumbent, the cable companies, who have 80 percent of that market. It hardly makes us a monopoly in that business. The Department of Justice has shared that view in their analysis of the Primestar merger back in 1998. And the FCC has also written in the past that as their—that being the relevant market.

In this market, cable rates have gone up about 2½ to 3 times the rate of inflation each and every year for the last 10 years, notwithstanding the fact that the DBS business has now been in business for 7 or 8 years. So we haven't been able to stop those inflationary, or those more than inflationary, increases, which means we haven't been as effective a competitor as we would like to be. We don't want government regulation, but we need to be able to compete effectively, and there are several barriers to entry, to our effectively competing against cable.

First and foremost, we duplicate each other's spectrum. We have this valuable resource in outer space that is very limited with only three full CONUS slots, yet we duplicate each other's spectrum. That means that of the 600 channels that we both broadcast, each of us are broadcasting over 500 of the very same channels. So the customer, in effect, may have a choice between providers, but doesn't have a choice in services.

Our operational inefficiencies are massive. We both have several billion dollars of satellites launched that do exactly the same thing. We have multiple uplink centers; we have multiple fiber connections to connect our points of presence; and we have different technologies and inoperative boxes between each platform. To compete, we must remove some of these barriers to entry, and the benefits will be obvious.

First and foremost, we will be able to increase our local markets where we compete against cable from about 40 markets to well over 100. And, in fact, we will be able to do at least one market in every single State.

Now, why that is important? The single biggest reason that people do not buy satellite systems today is lack of local broadcasting. People spend two-thirds of their time watching the popular networks' programs, and only one-third watching the 3 or 400 cable channels that are out there.

So if we don't have those network channels, we are not an effective competitor to cable. That is one reason the cable rates have gone up greater than the rate of inflation.

We also have the benefit of high definition television. For 6 or 7 years, broadcasters have talked about putting high definition television out across America, yet we see very little of that today. Yet satellite has the unique ability to broadcast high definition television to every square inch of the United States, including Alaska and Hawaii, if only we are permitted to do so and only if we have the spectrum to do that.

As you know, high definition television takes up about six regular channels worth of bandwidth. It doesn't make a lot of sense for DirecTV to broadcast HBO in high definition television and DISH Network to broadcast the very same channel, thus using very valuable capacity in the marketplace.

Our equipment is not interoperable. We both use different standards, so we have kind of a Beta/VHS situation going on within the business. It makes a lot more sense to become standardized so that set-top boxes, TV sets, recording devices in the future all can have the same standard in the box.

The cable industry is already doing that. We need to do that to be effective to effectively compete against them.

We also have some inefficiencies of scale. Our programming costs are our number one costs. About 40 percent of our costs are programming costs, yet we, as providers, pay somewhere between 5 and 15 percent more, on average, than the largest cable operators for our programming costs.

We need to be able to take advantage of the same volume discounts that an AT&T or a Time Warner can take advantage of. If we can get lower programming costs, then we can pass those savings on to consumers.

Chairman SENSENBRENNER. Mr. Ergen, do you think you could wrap up in about 15 seconds or so, because the light is on?

Mr. ERGEN. I show a minute here but I apologize. Mine shows a minute. So I don't know if——

Chairman SENSENBRENNER. That is over the 5.

Mr. ERGEN. Thank you. A minute over.

Additionally, uniform—we are willing to commit to uniform nationwide pricing. We already do that as a company. So that means that the people in rural America get all of the benefits of high-definition television, high-speed broadband access—something I didn't get a chance to talk about—and local television competitive competition with cable, at the same time paying the same price as in most competitive markets where there are cable overbuilders and true cable competition.

So, in conclusion, this merger is necessary for consumers. This merger is necessary for our industry to compete on an effective, level playing field.

Thank you very much. I will be happy to answer your questions.

Chairman SENSENBRENNER. Thank you.

[The prepared statement of Mr. Ergen follows:]

PREPARED STATEMENT OF CHARLES W. ERGEN

Mr. Chairman, Mr. Conyers and distinguished members of this Committee, on behalf of EchoStar Communications Corporation, I want to thank you for inviting our company to testify today. We appreciate the opportunity to discuss video competition issues and how the merger of EchoStar Communications Corporation (EchoStar) and Hughes Electronics Corporation (Hughes) will promote competition among multichannel video providers and offer much needed benefits for consumers. We would like to outline for you why we believe the merger should and will win antitrust approval from the Department of Justice (DOJ) and regulatory approval from the Federal Communications Commission (FCC).

I. ECHOSTAR'S LONG HISTORY OF COMPETING AGAINST CABLE

EchoStar started 21 years ago providing large, C-band satellite TV dishes to rural Americans. The demand grew quickly as consumers, schools and businesses sought television service in areas untouched by cable or off-air network TV signals. In 1996, we launched the small dish satellite TV service called DISH Network to provide competitive television services to urban and suburban consumers as well as those in rural areas. Since its debut, EchoStar's DISH Network has been the leader in the pay television industry in offering low prices for superior, digital television products. Other notable items about EchoStar include the following:

a) EchoStar began lowering its prices for satellite TV equipment to offer affordable or even free equipment and switched its annual programming fees for consumers to monthly fees, all in an attempt to compete better with cable companies.
b) Today, DISH Network offers consumers four main programming packages starting with America's Top 50 for $21.99 per month for over 60 channels that include the best in entertainment, sports, news and children's programming. The top programming package available from DISH Network is America's Everything Pak for $69.99 which offers 200 channels, including premium movie packages such as the popular HBO and Showtime.
c) We have been ranked number one in 2 of the last 3 years in the J.D. Power and Associate's customer satisfaction survey among satellite and cable TV subscribers.
d) A study by the University of Michigan Business School also rated EchoStar's DISH Network number one in overall customer satisfaction in 2001.[1]
e) We currently have 6 high-power direct broadcast satellites in orbit, and we expect to launch three more satellites within the next 2 years to expand our local TV channel service, to comply with must-carry rules and to offer other services.

[1] Source: American Customer Satisfaction Index, University of Michigan Business School, August 2001.

f) We have invested billions of dollars and extensive technological resources to compete vigorously in the marketplace with cable and to make satellite technology affordable and accessible for all Americans.

The planned merger with Hughes resulting in the new EchoStar, will be a huge advance in our long-standing mission to compete with the dominant and entrenched cable companies. Satellite TV providers have limited, scarce spectrum to broadcast programming, and right now, DISH Network and DirecTV each broadcast hundreds of duplicate channels. For instance, both companies broadcast the same two C-SPAN channels, the same Disney channels, and so on. The merger will end this wasteful redundancy and offer consumers more programming such as the following: local broadcast channels available via satellite to more markets; greatly expanded high-definition television programming; pay-per-view and video-on-demand services and educational, specialty and foreign-language programming; and other new and improved product offerings, including interactive TV services. The merger will also allow us to reduce the rates we pay programmers which will create greater value for consumers, especially by ending the practice of programming providers charging satellite TV companies higher rates than they do cable companies. The combined company will also help bridge the rural/urban "digital divide" through the rapid development of an affordable, satellite-based, two-way, always on, high-speed Internet access product available to both rural and urban areas.

New and better products, efficient operations, and more vigorous competition are precisely those things that the antitrust laws are meant to promote. That's why we believe that this merger will win the support of DOJ and FCC.

II. MARKET DEFINITION OF MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTION (MVPD)

DISH Network and DirecTV provide pay television services, including traditional cable networks like ESPN and CNN, premium movie channels like HBO, and local broadcast stations. Satellite TV providers compete with cable television providers, which offer similar channels and services and offer local broadcast stations in virtually every market they serve. Satellite TV providers also compete with other competitors that offer a similar mix of programming, including SMATV, which offers "private cable" to apartment buildings and single-family residential developments; Multipoint Multichannel Distribution Service (MMDS) or wireless cable; C-Band satellite TV service, which recently began to offer digital service nationwide; and cable overbuilders such as RCN, WideOpenWest and Knology that are beginning to deliver a multitude of bundled services by fiber. National Rural Telecommunications Cooperative (NRTC) and their affiliates, such as Pegasus Communications which has rights to independently market certain DirecTV programming in defined geographic areas, also compete in the pay television market, also known as the Multichannel Video Programming Distribution (MVPD) market.

Some have attempted to suggest that the relevant product market for examining this proposed merger should be narrowly defined to encompass only satellite TV services, while excluding cable television. But as you will see in my testimony, such a definition not only flies in the face of reality, it has also already been rejected by the DOJ. The DOJ clearly rejected that approach first in its 1998 case by blocking the acquisition by Primestar, Inc. of the 110 degree orbital slot, and more recently in comments urging the FCC to approve the transfer of that orbital slot to EchoStar. The DOJ has described that the relevant antitrust market as Multi-Channel Video Programming Distribution (MVPD) services.[2]

DirecTV and DISH Network are the nation's third and sixth largest MVPD providers, which after the merger would consist of about 15 million combined subscribers, or 17% of the MVPD market. By contrast, the dominant and entrenched cable companies control about 80% of the MVPD market with nearly 70 million subscribers, according to the FCC's *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*.[3] In fact, the top 10 largest cable firms such as AT&T, AOL-Time Warner, Comcast, Charter, and others account for over 61 million cable customers.[4]

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[2] *See, e.g.*, Complaint ¶¶ 67, 76, 85, *United States v. Primestar, Inc.*, Civil No. 1:98CV01193 (JLG) (D.D.C.) (May 12, 1998).

[3] FCC's *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*. January 2001

[4] Source: Cablevision Magazine Database, October 22, 2001. Basic subscriber counts are provided by MSOs and systems to Cablevision Magazine.

Cable firms continue to dominate the MVPD market and have raised rates an average of over 6% in each of the last 10 years.[5] These almost annual increases are two-and-a-half-times greater than the rate of inflation during the same period. In contrast, satellite TV equipment prices have steadily dropped and its programming prices risen only slightly, well below the rate of inflation. DirecTV did not raise its basic programming price from the launch of its service in 1994 until 2000, and DISH Network, since its launch in 1996, did not raise rates on its basic programming package until 2001.

1) Barriers to Competition

Satellite TV providers have made some headway in providing some competition against the dominant and entrenched cable companies, and American consumers are better off for it. However, EchoStar and Hughes face competitive barriers which prevent them from providing consumers with the programming and services they desire, and which limit satellite TV's effectiveness in provoking a competitive response from cable (as demonstrated by cable's ability to raise prices in the face of low satellite TV prices and 100 percent digital TV offerings). These barriers include:

a) The duplication of very limited and scarce satellite spectrum or bandwidth,
b) An inability to offer a more competitive, satellite Internet broadband option compared to cable's bundled video/Internet services,
c) Other operating inefficiencies such as duplicated administration, uplink, backhaul and satellite operations. This translates to $1.9 billion to $2.3 billion in unrealized savings and over $5 billion unrealized savings over a 3-year period,
d) Unrealized savings totaling billions of dollars from not combining satellite assets and spectrum sharing opportunities,
e) The burden of complying with must-carry rules, which force satellite TV providers to add hundreds of less popular local broadcast stations in markets where we carry local broadcast channels,
f) Our constrained ability to offer local TV channels due to limited, scarce satellite spectrum allocated by the government,
g) Our smaller market share of customers compared to the large cable operators. This hinders our ability to purchase necessary programming from cable operators at reasonable rates.

The merger will help break down these competitive barriers and will allow the new EchoStar to fulfill satellite TV's potential as a vigorous competitor to cable and offer greater benefits to American consumers.

III. CONSUMER BENEFITS OF PROPOSED MERGER

The only way to remove the barriers to competition and realize a more competitive marketplace is by taking advantage of the extraordinary efficiencies and synergies created by combining EchoStar and Hughes.

1) Vastly Increased Output of Programming and Services

Currently, the two satellite TV providers broadcast approximately 200 of the same entertainment, news and sports channels, and with the advent of must-carry rules on Jan. 1, 2002, both satellite TV companies will broadcast over 300 more of the same local and national TV channels for a total of over 500 duplicated channels. In other words, approximately 90% of the DBS spectrum will be wastefully repeated. These redundant transmissions are an inefficient use of limited satellite spectrum, and they prevent satellite TV providers from delivering other much needed content, such as local TV channels into more local areas or more high definition TV channels. By eliminating channel duplication, the merger will generate sufficient bandwidth for the new EchoStar to offer the following benefits:

a) The new EchoStar will expand local network television coverage from the current 42 markets the companies serve to over 100 markets, with local TV channels offered in at least one city in each state, including Alaska and Hawaii. This will provide local TV service to about 85% of U.S. households. This increase in the ability to serve local communities will eliminate the reason that consumers cite most often when deciding not to subscribe to satellite TV—the inability to receive their local broadcast channels.
b)

[5] Source: Kagan World Media.

The efficiencies from the merger will also allow the new EchoStar to offer more bandwidth-intensive HDTV programming with a minimum of 12 different channels. By offering a critical mass of HDTV programming, satellite TV could help jumpstart HDTV adoption, which has stagnated due to lack of the necessary bandwidth and the slow conversion by broadcasters and cable operators to this new medium. Our commitment to HDTV will provide incentives for programmers to increase HDTV programming, for manufacturers to market their HDTV sets more aggressively, for consumers to buy more HDTV sets, and for competitors like cable and network broadcasters to upgrade their HDTV capabilities, all resulting in lower prices for equipment and more HDTV channel choices for consumers.

c) As a result of the merger, the efficiencies that are created will make more bandwidth available for additional pay-per-view services as well as the necessary bandwidth and equipment development needed to compete against cable's new video-on-demand technologies.

d) Provide increased educational programming such as tele-medicine for rural areas, as well as more specialty and foreign-language programming,

e) The additional bandwidth will also allow the development of new and expanded interactive services such as localized weather and traffic, detailed point-and-click news and sports information, and television commerce shopping.

f) The merger will also allow the new company to expedite the introduction of affordable, satellite-based, two-way, always on, high-speed Internet access, as we will describe in more detail.

Overall, the merger will enable the new EchoStar to provide all of the above services at more competitive rates to cable without sacrificing quality or service.

2) Standardizing Satellite TV Equipment

Other efficiencies are gained by standardizing the two currently incompatible, satellite TV set-top box platforms currently offered by EchoStar and Hughes. Standardization will decrease manufacturing costs through volume purchasing and allow easier integration of satellite TV receiving equipment into TVs and other hardware. Standardization will also allow faster and more seamless production of new technologies like video on demand.

To the extent that consumers will need new equipment to accomplish this standardization, there will be *no costs* incurred by current EchoStar or Hughes subscribers who wish to maintain their current level of subscription television programming.

3) Cost Savings

In addition to the extraordinary bandwidth and satellite-based Internet access efficiencies, the merger will create significant cost-saving efficiencies for the new company. These savings will enable it to offer a greater value to MVPD consumers, including the following:

a) *Programming Costs*: The new company's major expense after the merger will be programming costs. Currently, our company pays higher rates for programming than our larger cable competitors. The merger will allow for a level playing field with cable companies where the new EchoStar will be able to take advantage of volume discounts and negotiate for a more competitive price, which will help keep satellite TV prices low for consumers.

b) *Advertising Revenue*: The merger will also create a critical mass of viewers that will be more attractive to national advertisers, thereby increasing competition for national television advertising dollars. More advertising revenue will allow our company to earn enhanced, alternative revenue streams that will assist in keeping satellite TV rates competitive against cable.

c) *Operational Savings*: In addition to services that will challenge the service offerings of cable, the new company will eliminate substantial redundancies in uplink and backhaul expenditures while increasing output. For instance, coordinated satellite launches can save approximately $250 million a year. The merger will also increase innovation through sharing of past research and increased investment opportunities.

The total cost savings from combining lower programming costs, increasing advertising revenue and reducing operational costs will total more than $2 billion after the first year and over $5 billion within a 3 year time span.

4) Greater Access to Broadband

Another important efficiency created by the merger is the consolidation of the two companies' satellite broadband Internet services. Only through consolidation of satellites and spectrum will the new EchoStar be able to achieve the economies of scale and spectrum necessary to enable it to compete more effectively against the bundled cable/telephony/Internet services of cable. While broadband access is widely available in much of urban and suburban America, service to rural areas has lagged far behind. The efficiencies created by this merger will help bridge the "digital divide" between our urban and rural citizens. The new EchoStar will serve millions of rural Americans without access to cable modem service or DSL with two-way, always-on, satellite-based, high-speed Internet access. At the same time, we will be better positioned to compete on a more level playing field with cable modems and DSL in urban areas, offering the same quality everywhere, all at competitively set, nationwide prices.

Developing an efficient-scale satellite Internet service will require each company to put at risk an investment of at least $2 billion, without the fair prospect—given each company's respective subscriber base—of acquiring the number of users needed to make that investment economical.

Both EchoStar and Hughes currently have relationships with start-up companies to develop satellite-based Internet systems that can be integrated with satellite video services. Each has a relationship with different firms currently offering services in the Ku band, and with firms developing services in the Ka band.[6] Due to high equipment and installation costs of approximately $1,000, and monthly service fees ranging from $60 to $100, the service is simply not competitive on a price/quality basis with cable modem service or DSL. Currently, only one percent of total satellite subscribers, fewer than 200,000 subscribers, use the data services. Under current circumstances, this product serves only a high-priced, niche portion of the market. In order to justify the investment in research and development, satellite launches, and related infrastructure, as well as to bring costs down to competitive levels, a satellite-based Internet service would need vastly greater economies of scale to succeed against cable modem or DSL service. Neither satellite TV company alone has a large enough subscriber base from which to achieve the scale for Internet service that would result in effective competition to cable and DSL offerings. Thus, it is necessary for the two satellite TV companies to combine their efforts in order to have a realistic chance of success.

IV. MERGER IS NECESSARY TO FOSTER COMPETITION

We believe after the merger of EchoStar and Hughes, consumers nationwide will have the kind of competition to cable that members of Congress hoped for when they passed the 1996 Telecommunications Act. Indeed, the proposed merger between EchoStar and Hughes is a vital step toward bringing price and service competition to the MVPD marketplace.

1) A Healthy MVPD Market Creates Competition

The new EchoStar will become the first truly effective competitor to cable. However, some opponents of our merger would rather see two competitively weakened satellite TV providers rather than a single, combined, effective provider competing against the dominant and entrenched cable companies.

Satellite TV providers have an economic mandate to price low and provide high quality service. This model has developed because of the tremendous upside potential of winning customers from cable's huge installed customer base, the risk of losing current satellite customers if our pricing is not competitive, and satellite TV's high fixed costs and low marginal costs. Moreover, the capital market's investment in satellite TV has been significantly premised on the expectation of continued growth, making any slow-growth strategy unpalatable to a critical constituency.

Satellite TV providers compete with dozens of cable firms nationwide, each of which offers different price and quality combinations. Because satellite TV providers offer national distribution, they must compete rigorously with the most competitive of these cable companies, most of which offer a full array of digital services including Internet/telephony/video bundles.

Digital cable's improved capabilities, in particular, threaten to take away satellite TV's most profitable, high-end customers who are the most willing to pay for the highest quality service. As the gap closes on our past advantages, the merger is the

[6] The Ka band system will not be ready for launch until 2002 at the earliest. The Ka band system is risky because this band is subject to more rain interference than the Ku band and may have technical problems.

only way that satellite TV will be able to compete aggressively with cable's rapidly improving services.

In addition, satellite TV faces competition from cable overbuilders, Regional Bell Operating Companies (RBOCs), and utility companies, which have offered video services to a substantial and growing portion of the U.S. population, especially where the most profitable customers are concentrated. These competitors' products, often including phone and data service, create even more uniformity than the varied cable offerings. In addition, C-Band is also strong in non-cable areas, and has been recently reinvigorated with the ability to offer digital, rather than analog, signals.

2) Broadcasters as New Entrant into MVPD Market

In the past, the National Association of Broadcasters has consistently demanded from satellite TV providers that they must carry all local channels in as many cities as possible. As a result of the merger, the new EchoStar can better achieve the broadcasters' objectives. However, the broadcasters have recently reversed their course on this objective by opposing our merger. This opposition is on dubious grounds since they have recently received free digital spectrum. It may be that their true motivation for opposing the merger is to stifle competition, particularly now that they have free channel capacity they can use to offer subscription television services and compete with cable, satellite and others in the MVPD market. Only with the merger will there be effective competition in the MVPD marketplace and only then will satellite TV be able to offer hundreds more local TV channels in over 100 markets and at least one city in all 50 states for approximately 85% coverage.

3) Uniform, Nationwide Pricing

The benefits of competition between cable and satellite TV will not be limited to consumers in areas with cable TV service. Satellite TV service, as a matter of physics, is distributed nationally, and we will by necessity continue to offer nationwide prices for our services. Therefore, all of the benefits of the merger will be available to consumers across the country regardless of their community's terrestrial telecommunications infrastructure. This will be especially beneficial for rural consumers who have long been ignored by cable. With nationwide pricing, rural Americans will be able receive the full benefits of the increased competition between satellite and cable companies in urban and suburban areas. This is because the new EchoStar pricing and programming decisions will be driven by competition against the most competitive cable firms, including those that face significant competition from cable overbuilders or local MMDS systems, and consumers nationwide will reap the rewards.

According to the FCC, only 3.4 percent of rural American homes are not passed by cable,[7] constituting a small amount of homes. While the majority of these homes will have a choice between video services provided by the NRTC and their affiliates, the new EchoStar, or even other MVPD providers such as C-Band providers, we are sensitive to the concerns that competition in certain areas of rural America could potentially be reduced. That is why we have committed to nationwide pricing where all consumers, including rural Americans, will get the price benefits from the intense competition occurring in urban areas. We offer nationwide pricing today and we're willing to commit to this going forward so that rural areas will get the advantages of competitive prices occurring in urban areas that will provide more entertainment channels, high definition television, greater access to local TV channels, and specialty and educational channels.

The new company will also continue to honor DirecTV's contract with the NRTC, which gives the co-op and its corporate partner, Pegasus, the ability to offer competitive DBS service from a single orbital position that covers the entire country. This will not change with the merger. In addition, consumers will be able to purchase service from DISH Network, which will likely continue to offer its brand name in these regions, and from its established network of dealers who have proven extremely effective at serving rural America. It is our hope that Pegasus and NRTC will continue to sell their product and continue to be aggressive in their territories as a competitive participant in the MVPD marketplace.

There will be other competitors in this region besides the NRTC. C-Band, which offers a new digital service driven by Motorola, is strong in rural America. Cablevision and Dominion are video providers who also have FCC licenses to offer satellite TV service and have announced plans to expand their MVPD services in the near future. Proposed terrestrial and other wireless spectrum technologies, such as

[7] Source for number of rural consumers unserved by cable: FCC's *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Footnote #80—December 1. Assessment *released* January 2001.

MMDS and those proposed by Northpoint Technologies, will also offer additional options for rural customers. EchoStar is not opposed to any of these technologies or similar competitors. However, like any other wireless licensee in other spectrums, such as cellular services or digital services offered by network broadcasters, we are opposed to permitting electrical interference from other providers within the same spectrum in which we operate.

While EchoStar does not oppose the emergence of new competitors in the MVPD market, we are opposing the proposal by Northpoint, one of the companies seeking to enter the multichannel delivery market by using wireless cable technologies, because NorthPoint's current proposal would interfere with the satellite reception of our established satellite TV customers. EchoStar's concerns about the electrical interference that Northpoint would cause our customers' satellite TV signals has been confirmed by an independent arbiter: after conducting tests required by Congress, the MITRE Corporation has concluded that such a new service would threaten "significant interference" for the satellite TV service, and that the benefit of any mitigation methods must be weighed against their cost as well as the interference that would remain.[8] In the spirit of constructiveness, not obstruction, EchoStar has recently filed with the FCC a petition suggesting alternative frequencies, including the "CARS" frequencies—which are "next-door neighbors" to satellite TV frequencies as well as the MMDS frequencies, in an effort to find a suitable home for Northpoint's plan. The FCC has identified the CARS spectrum as a suitable place to increase spectrum usage. CARS spectrum is not currently used to serve consumers directly, eliminating any major interference concerns. Like the satellite TV spectrum, the CARS spectrum can be used to deliver MVPD service. Also similar to satellite TV spectrum, the CARS spectrum is used for point-to-point and point-to-multipoint technology, suggesting that a directional service like that proposed by Northpoint would be feasible on a spectrum-sharing basis. Finally, like satellite TV, CARS offers a full 500 MHz of spectrum, meeting one of the conditions sought after by Northpoint. With our filing yesterday concerning this proposed solution, we hope that Congress will see that we are not opposed to competition. We are simply opposed to interference within the same spectrum.

We welcome the competition, so long as it does not interfere with satellite TV service for approximately 15 million Americans receiving service from the new EchoStar.

V. CONCLUSION

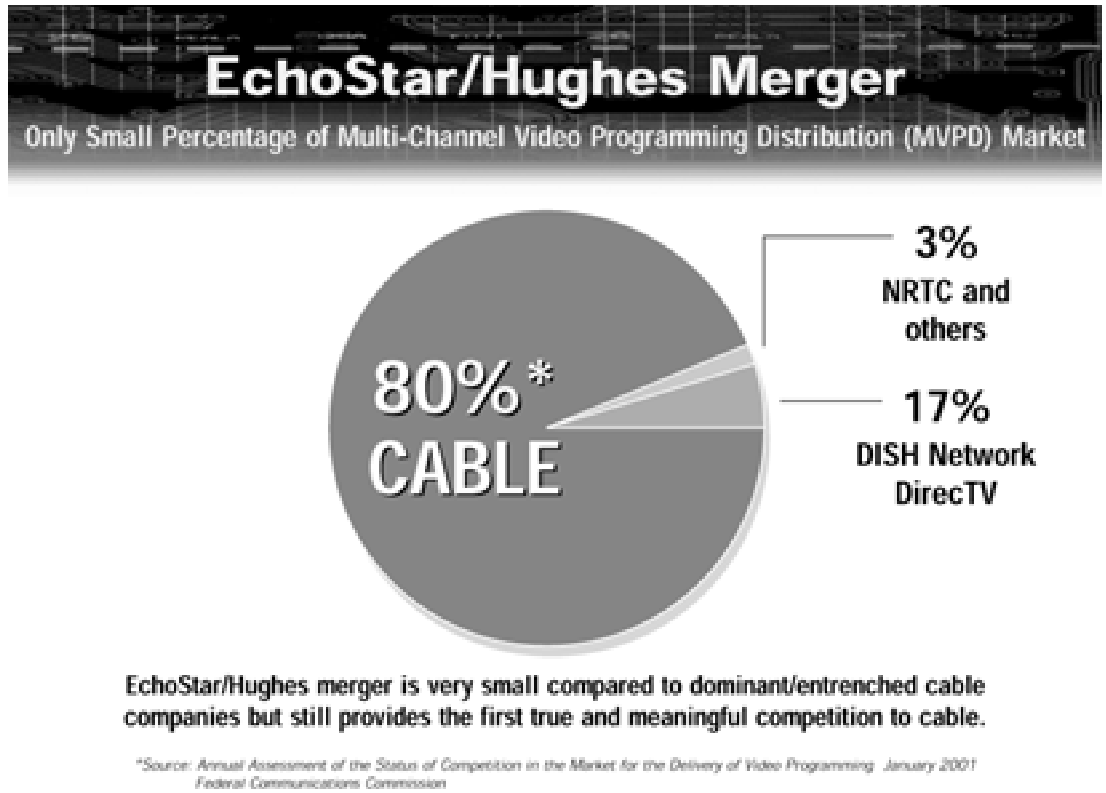
Competition in the multichannel video marketplace continues to expand but will only reach fruition if satellite TV is allowed to become a truly effective competitor to the dominant and entrenched cable companies. The proposed combination of EchoStar and Hughes creates massive synergies and cost savings that enable the new EchoStar to offer more local TV channels into many more markets than ever before, faster introduction of Internet access, and the rapid advancement of high definition TV and interactive television services like video on demand. In effect, these new and expanded services will place satellite TV on a more level playing field with digital cable. As a result, American consumers will benefit by receiving competitive prices nationwide, both for current services and for new services that would not otherwise be available. Combining EchoStar and Hughes is the only way to provide truly effective competition to cable companies, which will benefit all consumers.

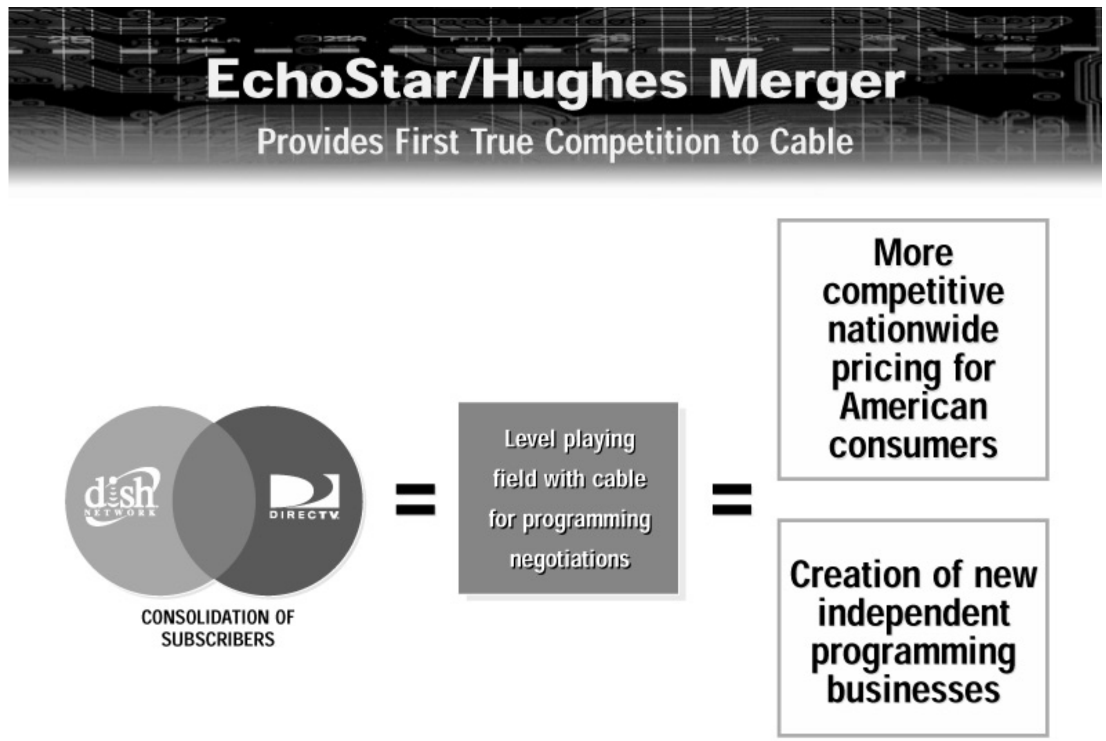
We are confident that after a thorough evaluation, the DOJ and the FCC will find that the proposed merger will not violate antitrust laws, is in the public interest, and most importantly, will result in substantial, pro-competitive, consumer benefits in both rural and urban America. We look forward to working closely with these agencies and individuals in their reviews.

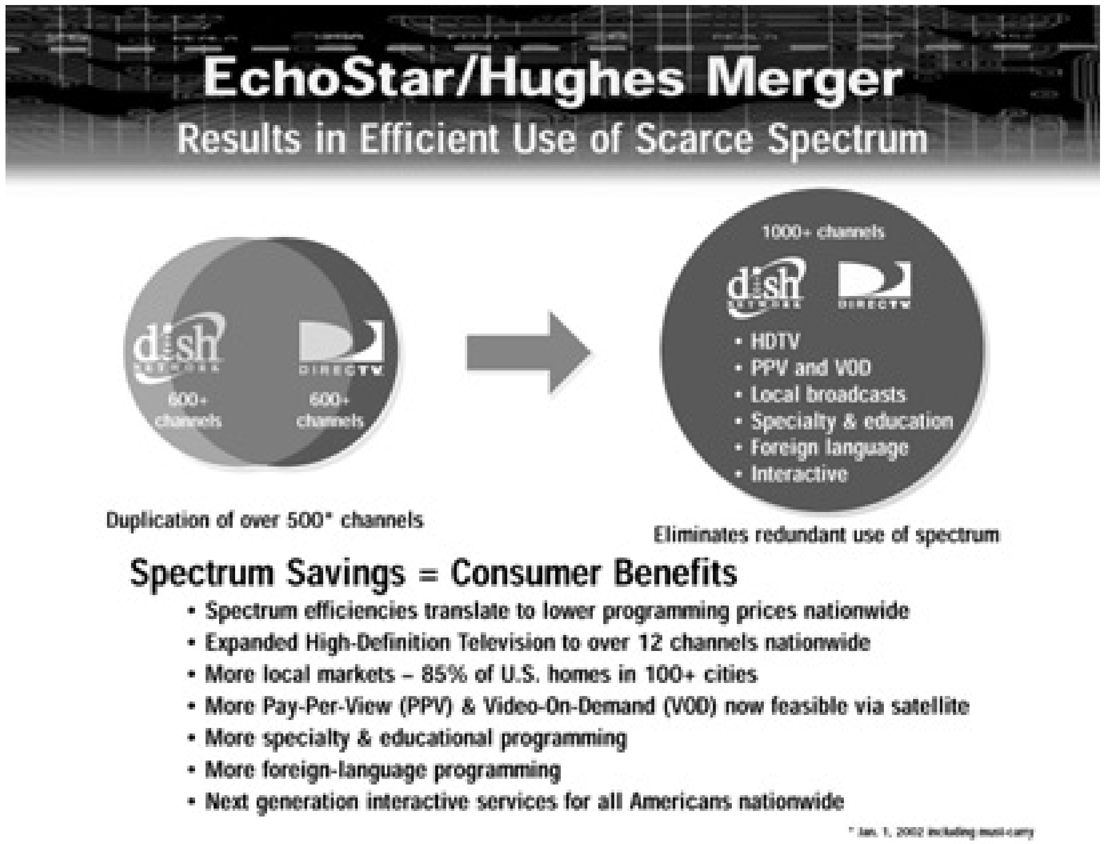
I appreciate the opportunity to testify, and I am willing to answer any questions.

[8] Source: The MITRE Technical Report: Analysis of Potential MVDDS Interference to DBS in the 12.2–12.7 GHz band. April 2001.


ECHOSTAR
HUGHES
MERGER


EchoStar/Hughes Merger
Only Small Percentage of Multi-Channel Video Programming Distribution (MVPD) Market
80%*
CABLE
3%
NRTC and
others
17%
DISH Network
DirecTV
EchoStar/Hughes merger is very small compared to dominant/entrenched cable companies but still provides the first true and meaningful competition to cable.
*Source: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming January 2001
Federal Communications Commission

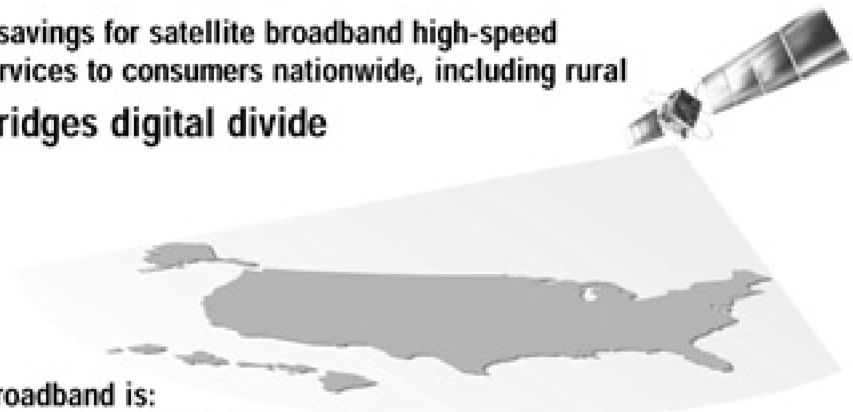

EchoStar/Hughes Merger
Provides First True Competition to Cable
dish NETWORK
DIRECTV
CONSOLIDATION OF SUBSCRIBERS
=
Level playing field with cable for programming negotiations
=
More competitive nationwide pricing for American consumers
Creation of new independent programming businesses


EchoStar/Hughes Merger
Results in Efficient Use of Scarce Spectrum
600+ channels
600+ channels
Duplication of over 500* channels
1000+ channels
• HDTV
• PPV and VOD
• Local broadcasts
• Specialty & education
• Foreign language
• Interactive
Eliminates redundant use of spectrum
Spectrum Savings = Consumer Benefits
• Spectrum efficiencies translate to lower programming prices nationwide
• Expanded High-Definition Television to over 12 channels nationwide
• More local markets – 85% of U.S. homes in 100+ cities
• More Pay-Per-View (PPV) & Video-On-Demand (VOD) now feasible via satellite
• More specialty & educational programming
• More foreign-language programming
• Next generation interactive services for all Americans nationwide
* Jan. 1, 2002 including must-carry

EchoStar/Hughes Merger
Results in Consumer Benefits for American Public

50% cost savings for satellite broadband high-speed internet services to consumers nationwide, including rural

- Bridges digital divide



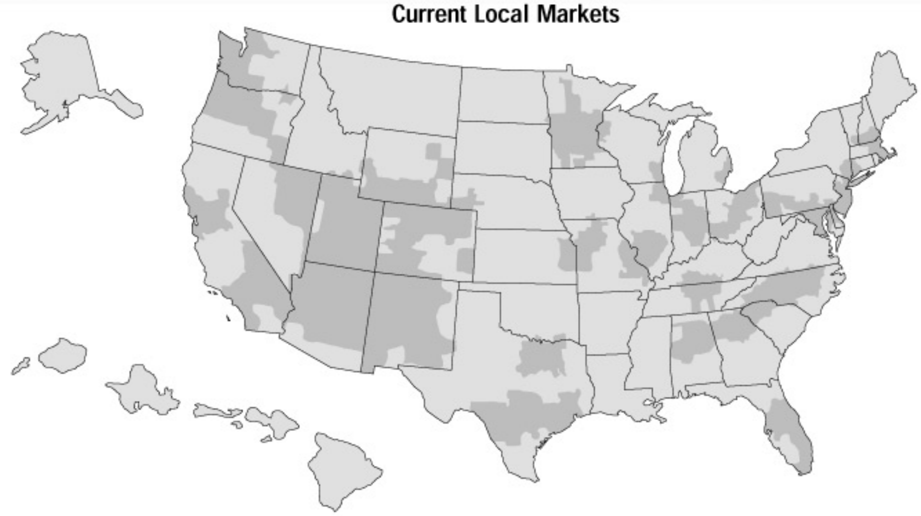
Satellite broadband is:

- Deployable everywhere
- Cost effective everywhere
- Same quality everywhere
- "Always-on" service everywhere

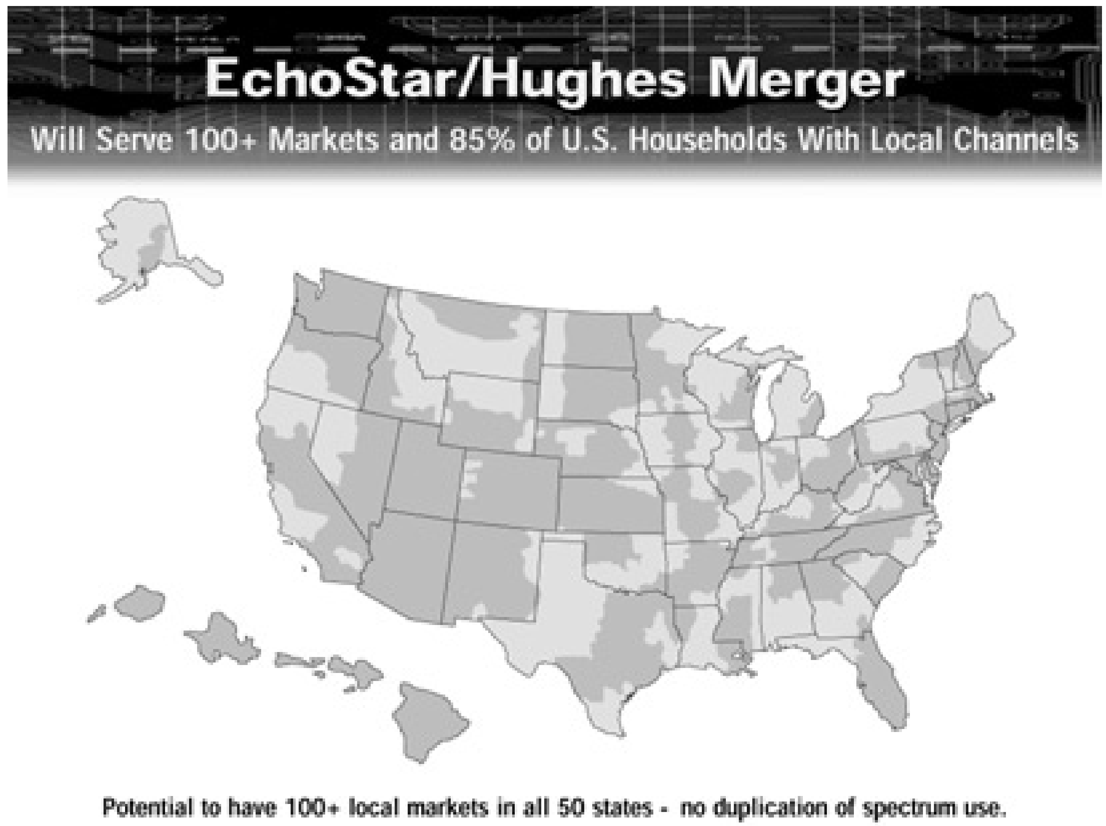
EchoStar/Hughes Merger

Eliminates Inefficient Use of Scarce DBS Spectrum

Current Local Markets



- EchoStar and Hughes currently serve only 42 local markets
- 35 local markets currently served by both EchoStar and Hughes
- Eliminating duplication = more local markets served


EchoStar/Hughes Merger
Will Serve 100+ Markets and 85% of U.S. Households With Local Channels
Potential to have 100+ local markets in all 50 states - no duplication of spectrum use.


EchoStar/Hughes Merger
Potential to Serve Over 100+ Markets & at Least One City in All 50 States
ANCHORAGE
SEATTLE
PORTLAND
GREAT FALLS
FARGO
MINNEAPOLIS/
ST. PAUL
BOISE
SIOUX FALLS
MILWAUKEE
GRAND RAPIDS
SACRAMENTO
SAN FRANCISCO
SALT LAKE CITY
CHEYENNE
CHICAGO
DETROIT
CLEVELAND
LINCOLN
DES MOINES
COLUMBUS
DENVER
INDIANAPOLIS
FRESNO
LAS VEGAS
KANSAS CITY
CINCINNATI
LOS ANGELES
WICHITA
ST. LOUIS
LOUISVILLE
NASHVILLE
ALBUQUERQUE
OKLAHOMA CITY
MEMPHIS
SAN DIEGO
TUCSON
LITTLE ROCK
PHOENIX
BIRMINGHAM
DALLAS/FT. WORTH
JACKSON
NEW ORLEANS
HONOLULU
HOUSTON
SAN ANTONIO
BURLINGTON
PORTLAND
MANCHESTER
BOSTON
BUFFALO
HARTFORD
PROVIDENCE
NEW YORK
PITTSBURGH
PHILADELPHIA
BALTIMORE
WILMINGTON
WASHINGTON, D.C.
RICHMOND
ROANOKE
CHARLESTON
RALEIGH/DURHAM
CHARLOTTE
GREENSBORO
GREENVILLE
ATLANTA
JACKSONVILLE
ORLANDO
TAMPA/ST. PETERSBURG
WEST PALM
MIAMI

In connection with the proposed transactions, General Motors, Hughes and EchoStar intend to file relevant materials with the Securities and Exchange Commission, including one or more Registration Statement(s) on Form S-4 that contain a prospectus and proxy/consent solicitation statement. Because those documents will contain important information, holders of GM $1-2/3 and GM Class H common stock are urged to read them, if and when they become available. When filed with the SEC, they will be available for free at the SECs website, www.sec.gov, and GM stockholders will receive information at an appropriate time on how to obtain transaction-related documents for free from General Motors. Such documents are not currently available.

General Motors and its directors and executive officers, Hughes and certain of its officers, and EchoStar and certain of its executive officers may be deemed to be participants in GMs solicitation of proxies or consents from the holders of GM $1-2/3 common stock and GM Class H common stock in connection with the proposed transactions. Information regarding the participants and their interests in the solicitation was filed pursuant to Rule 425 with the SEC by each of GM, Hughes and EchoStar on November 1, 2001. Investors may obtain additional information regarding the interests of the participants by reading the prospectus and proxy/consent solicitation statement if and when it becomes available.

This communication shall not constitute an offer to sell or the solicitation of an offer to buy, nor shall there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction. No offering of securities shall be made except by means of a prospectus meeting the requirements of Section 10 of the Securities Act of 1933, as amended.

Materials included in this document contain forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Such forward-looking statements involve known and unknown risks, uncertainties and other factors that could cause our actual results to be materially different from historical results or from any future results expressed or implied by such forward-looking statements. The factors that could cause actual results of General Motors Corp. (GM), EchoStar Communications Corporation (EchoStar), Hughes Electronics Corp. (Hughes), or a combined EchoStar and Hughes to differ materially, many of which are beyond the control of EchoStar, Hughes or GM include, but are not limited to, the following: (1) the businesses of EchoStar and Hughes may not be integrated successfully or such integration may be more difficult, time-consuming or costly than expected; (2) expected benefits and synergies from the combination may not be realized within the expected time frame or at all; (3) revenues following the transaction may be lower than expected; (4) operating costs, customer loss and business disruption including, without limitation, difficulties in maintaining relationships with employees, customers, clients or suppliers, may be greater than expected following the transaction; (5) generating the incremental growth in the subscriber base of the combined company may be more costly or difficult than expected; (6) the regulatory approvals required for the transaction may not be obtained on the terms expected or on the anticipated schedule; (7) the effects of legislative and regulatory changes; (8) an inability to obtain certain retransmission consents; (9) an inability to retain necessary authorizations from the FCC; (10) an increase in competition from cable as a result of digital cable or otherwise, direct broadcast satellite, other satellite system operators, and other providers of subscription television services; (11) the introduction of new technologies and competitors into the subscription television business; (12) changes in labor, programming, equipment and capital costs; (13) future acquisitions, strategic partnership and divestitures; (14) general business and economic conditions; and (15) other risks described from time to time in periodic reports filed by EchoStar, Hughes or GM with the Securities and Exchange Commission. You are urged to consider statements that include the words may, will, would, could, should, believes, estimates, projects, potential, expects, plans, anticipates, intends, continues, forecast, designed, goal, or the negative of those words or other comparable words to be uncertain and forward-looking. This cautionary statement applies to all forward-looking statements included in this document.

Chairman SENSENBRENNER. Professor Pitofsky.

TESTIMONY OF ROBERT PITOFSKY, GEORGETOWN UNIVERSITY LAW SCHOOL

Mr. PITOFSKY. Thank you, Mr. Chairman, Mr. Conyers. It is always a pleasure for me to appear before the Members of this Committee.

I would like to talk a lit bit about the antitrust problems, and then address some of the purported justifications for this deal. I will try to be brief about the problems, because I think Members of the Committee get it.

Let's divide the country up by those portions served by cable and those that are not. The Chairman mentioned that 30 percent of the people in Wisconsin don't have access to cable. That is not unusual; 30 to 50 percent of people in 20 different States don't have access to cable.

For those people, a merger of these two satellite companies is a virtual merger to monopoly, with high entry barriers, so no one else is going to come in to alleviate that condition.

Let's look at the rest of the country. It is true that the satellite companies will compete with cable companies. But do they also compete more directly and more fully with each other so as to justify their being in a separate market, so there, too, it is a merger to monopoly? And it seems to me that that could easily be the case.

The analogy, I would suggest, is between railroads and airlines. Railroads and airlines compete, for example, New York to Washington, Washington to New York, but that doesn't mean you let all of the airlines merge to monopoly. Because of their special prices, qualities, appeal to consumers, they are a separate market.

And, incidentally, that is not an argument that only I ascribe to. Mr. Ergen said many think that they are in a separate market. Well, that includes EchoStar, which just a year ago in a private case against DirecTV argued that EchoStar and DirecTV constrain each other's prices and cable is not an effective constraint of prices in that market.

Finally, even if I am wrong about all of this, it is still a three-to-two merger, and the Court of Appeals of the District of Columbia just a year ago when Beechnut and Heinz tried to merge in circumstances very similar to this, a larger number one, two and three said, we need the merger to compete, there were high entry barriers; and the court said, we have looked back and we can't find a single case in history—I think they meant 110 years—in which a merger of this type was allowed.

Those are the problems.

What are the justifications? First, is the trade-off argument. Yes, the people in rural America will sacrifice some competition, but it is worth it because it will improve competition in the rest of the country. My answer to that argument is simple. We don't do it that way.

The antitrust laws say, mergers that lessen competition in any market are illegal. And we don't trade off procompetitive effects in one market against anticompetitive effects in another. The Supreme Court could not have been clearer about this in Philadelphia National Bank and since.

Second, Mr. Ergen states, and I'm prepared to accept his claim, that there are real efficiencies to this deal. Well, first of all, there is a bipartisan consensus that efficiencies are easy to allege and hard to prove; and therefore you would want to look very carefully at the efficiency claims.

But let's assume that the efficiencies are there, and certainly some of them are there. But then the question is whether efficiencies justify a merger to monopoly or near monopoly. I have been one who has been more welcoming of efficiency defenses than almost anyone in our community; but I have always said, it doesn't justify mergers to monopoly. The DOJ-FTC guidelines say it doesn't justify mergers to monopoly.

What is the point of achieving all of those efficiencies if you are a monopoly? Where is the incentive then to pass the efficiencies on to consumers without a competitive market?

Finally and most interestingly, EchoStar suggests that the rural subscribers don't have to worry because there is competition in the urban areas, and EchoStar will give others who are in areas not served by cable the same deal that they give to people served by cable, so they will get the benefits of something like competition.

It is interesting, it is novel, but I just don't think it hangs together for four reasons. First, it puts the government in the position of doing something that the government hates to do, and that is review, monitor and check whether there is price discrimination from community to community to community throughout the United States.

Whenever I hear from the satellite companies, it is about special offers, free goods, 30 days free, et cetera. How do you reconcile all of that in every single city, many of which are quite different in terms of their income?

Second, that takes care of the price problem. I have less than a minute, Mr. Chairman.

But what about all of the other forms of competition—service, quality, reliability, technology? In an area like this, you want companies vigorously competing on the technological front.

Third, it is still a three to two merged at best in the urban areas. I would regard it as cold comfort if I were somebody who couldn't get cable and was told, I will get the benefit of competition in other parts of the country when competition has been reduced from three firms to two.

Finally, lastly, this proposed merger raises a very fundamental question about what antitrust is all about. We have bet this country for over 100 years on a system of free market protected by antitrust in which independent rivals compete fiercely, as the satellite companies have done to advance consumer welfare, to improve their product, to lower their prices.

This is a proposal that we should trust well-intentioned people; they promise that they won't overdo it, they won't abuse the market power that this merger allows. We haven't accepted that kind of argument in this country.

Now, maybe there is another deal that can be worked out here. Maybe DirecTV is leaving the market no matter what happens. But I have to say that this deal, as proposed, has very serious problems.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pitofsky follows:]

PREPARED STATEMENT OF ROBERT PITOFSKY

Mr. Chairman, members of the Committee, I am pleased to appear before you today to present testimony concerning application of the antitrust laws to the proposed merger between EchoStar Corporation and G. M. Hughes Electronics, the parent company of DirecTV. I believe this merger raises profound issues for antitrust policy in both the telecommunications and media industries.

Let me disclose at the outset that I am now Counsel to the Washington law firm of Arnold & Porter, and the firm represents Pegasus, a distributor of DBS services and therefore a company with a deep interest in the economic consequences of this merger.

EchoStar and DirecTV are today the only facilities based providers of direct broadcast satellite (DBS) services in the United States. Between them they control all three of the orbital slots licensed by the Federal Communications Commission for DBS service capable of serving the entire U.S. It seems to be a common understanding that no additional satellites are likely to be available for DBS service in the foreseeable future. Put another way, the barriers to entry into DBS service are virtually insurmountable. That was the reason that the Department of Justice, when it issued a complaint in 1998 seeking to block the acquisition by Primestar of an orbital slot then held by MCI and NewsCorp, alleged there was no feasible means of entry into the multi-channel video business in the near future.[1] That statement is no less true today than it was in 1998.

The testimony before the Committee today has revealed that there are many issues of fact relating to this transaction. For example, there are claims that the proposed merger offers an opportunity for substantial efficiencies, and those efficiencies are likely to be passed on to consumers in the form of improved services. I am prepared to assume for the sake of this session that the people advocating the legality of this merger are well intentioned and credible and that their efficiency claims—while they will have to be carefully analyzed and confirmed—can be assumed for now to be true. Even on that basis, I offer my own conclusion that this transaction as presented faces serious—perhaps the more accurate description is insurmountable—antitrust problems.

It is helpful in thinking about the competitive and consumer effects of this proposed merger to consider its impact in different parts of the country. Today in many sections of the country—mostly rural but accounting for millions of subscribers—there is no cable television available.[2] In other sections where cable is present, there are antiquated facilities that are unlikely to be upgraded in the foreseeable future so that cable is a limited competitor. In those areas, however, consumers do have the benefit of two DBS providers—DirecTV and EchoStar—which compete aggressively for consumer subscriptions through discounts, free equipment, improved service, and similar inducements. For subscribers located in those non-cable or limited-cable areas, this proposed deal is clearly a merger to monopoly, with the predictable higher prices and indifferent quality that experience demonstrates will follow in the wake of that level of market power. In rural areas, this merger does not "lessen competition," it completely eliminates it.

On October 30, a *Wall Street Journal* editorial took an unusual view of the plight of viewers in non-cable areas. It observed that "those who choose to live in a cornfield have no claim on the rest of the economy just to subsidize their entertainment options" and therefore presumably can be left to the mercy of a monopolist.[3] Fortunately, the antitrust laws prevent mergers that lessen competition "in any section of the country,"[4] even sections some in the press think are too unsophisticated to matter.

Those who would like to see the merger go through unchallenged are likely to argue that it is worthwhile giving up some competition in some parts of the country because the combined DBS outlets will be in a better position to compete with cable in other sections of the country. They argue that only DBS is in a position to challenge the high rates and less-than-perfect service offered by the huge cable companies. One problem with that argument is that in almost all sections of the country, there is only one cable supplier and unhappy subscribers now have two alternative and competing DBS sources to consider. After the merger there will be only one DBS source. As a result, even if one concedes that DBS and cable are direct com-

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[1] Complaint at ¶¶ 84, 103, *United States v. Primestar, Inc. et al.*, (D.D.C. filed May 12, 1998).

[2] For example, a recent New York Times article estimated that 40–50% of homes in the following states are without cable access: Montana, South Dakota, Utah, Mississippi, Arkansas and Vermont. In other states, including Idaho, Wyoming, New Mexico, Oklahoma, Louisiana, Missouri, Idaho, Alabama, Tennessee, Kentucky, Virginia, North Carolina, Maine and Wisconsin, an estimated 30–40% of homes are without cable access. *See Look, Up in the Sky! Big Bets on a Big Deal*, N.Y. TIMES, Oct. 30, 2001, at C1.

[3] *EchoStar Power*, WALL ST. J., Oct. 30, 2001, at A22.

[4] The key provision of Section 7 of the Clayton Act reads as follows:No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce *in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 15 U.S.C. § 18 (emphasis added).

petitors—a point that EchoStar challenged a little more than a year ago in a private antitrust lawsuit[5]—the merger would still result in a reduction of competitors from three to two with no prospect of new entry to alleviate that condition in the foreseeable future.

Let's assume, contrary to the forcefully stated views held by EchoStar just last year, that DBS and cable are in the same markets. There is a long history of the second and third firms in a three-firm market, with high barriers to entry, arguing that the combination will be better equipped to challenge the powerful number one. That argument was advanced by Heinz and Beechnut a year ago when their merger, allegedly to put them in a position to compete more effectively with the dominant Gerber, was challenged by the FTC. A unanimous District of Columbia Court of Appeals enjoined the merger in language that applies almost perfectly to the proposed EchoStar-DirecTV deal:

> "[There have been] no significant entries in the baby food market in decades and . . . [new entry is] difficult and improbable . . . As far as we can determine, no court has ever approved a merger to duopoly under similar circumstances."[6]

In advocating a fundamental change in merger policy, defenders of the merger have advanced several arguments. I noted earlier the argument that even conceding a lessening of competition to consumers in rural America, that reduction is worthwhile in order to improve competition in the remaining parts of the country. That kind of tradeoff often is suggested by those sponsoring a merger. In one of the first cases reviewed by the Supreme Court after Section 7 of the Clayton Act was amended and updated in 1950, two Philadelphia banks tried to justify a merger that would produce a high level of concentration in the local market on grounds that consumers in Philadelphia might be harmed, but the merger would allow the larger bank resulting from the merger to compete for very large loans with still larger out-of-state banks, particularly those located in New York. In language that the Court has adhered to consistently ever since, it rejected what it called a concept of "counterveiling power."

> "If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."[7]

Supporters of the merger also appear to argue that it will allow the combined firms to offer efficiencies to consumers, and with those efficiencies improved service. It will require fairly extensive investigation to determine the magnitude of any claimed efficiencies and also to address the question of whether those efficiencies could be achieved through means other than a merger between two direct competitors.

As noted earlier, I am willing to assume for purposes of this discussion that significant efficiencies may result. Nevertheless, under the Department of Justice-FTC revised Merger Guidelines, issued in 1997, and indicating for the first time a willingness on the part of federal enforcement officials to take efficiencies into account, any such efficiencies would not be adequate to justify what is an otherwise illegal merger that leads to monopoly or near monopoly. After explaining that mergers that produce high concentration can only be justified by exceptionally substantial efficiencies, and that there must be the likelihood that those efficiencies would benefit consumers and have little potential adverse competitive effects, the Guidelines note:

> "In the Agency's experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the

[5] Among the many points cited by EchoStar in arguing that DBS is a separate product market from cable are the following: a) A significant number of DBS subscribers view DirecTV and EchoStar as significantly closer substitutes than alternative sources of programming, including cable television; b) If not constrained by EchoStar, DirecTV could raise its prices above the competitive level without experiencing a significant constraint by cable; c) DBS and/or High Power DBS is superior to most cable services in several respects, including a higher quality picture, substantially more programming options, and pay-per-view in a "near-on-demand" environment that consumers find more attractive than the pay-per-view environment offered by cable. *See* Memorandum of Law in Support of Request for Rule 56 Continuance to Respond to DirecTV Defendants' Motion for Summary Judgment at 11–12, *EchoStar Communications Corp. v. DirecTV Enters., Inc.*, No. 00-K-212 (D. Colo. filed Nov. 6, 2000).

[6] *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001).

[7] *United States v. Philadelphia National Bank*, 374 U.S. 321, 370 (1963).

efficiencies, are not great. *Efficiencies almost never justify a merger to monopoly or near-monopoly*." (Italics added.)[8]

Let me elaborate briefly on the point. The reason the DOJ/FTC Merger Guidelines were amended to permit efficiency claims is that efficiencies generated by merger may enhance the merged firms ability and incentive to compete, and may result in lower prices, improved quality, enhanced services or new products. But the whole idea is that those efficiencies would then be likely to be passed on to consumers. If the merger leads to monopoly or a near monopoly. there is no reason for the firms not to decide to pocket the gains that result from no longer competing with each other. Thus, even under a liberal interpretation of the role of efficiencies in merger enforcement, they would not be sufficient to save the kind of illegal transaction proposed by EchoStar and DirecTV.

Finally, advocates of the proposed merger have advanced a most unusual argument. They suggest that for most of the country the combined DBS company will have to compete with cable, and competition with cable will keep the DBS rates competitive. They also have promised not to discriminate between rates and terms offered in cable and non-cable areas, so that subscribers in rural areas, faced with a monopoly, would not have to pay monopoly rates.

There are several problems with that argument. First, it leaves the government in the position of monitoring rates and complicated terms in every community to guard against discrimination—a role that the government tries not to play in a free market economy—certainly not when the transaction is a horizontal merger to monopoly or near monopoly. Second, even if the price terms are worked out, that says nothing about the loss of competition in non-price dimensions—including customer service, programming packages, advanced services and, in particular, technological competition. In a high-tech, dynamic, rapidly developing field like video programming delivery, competition in terms of quality and technology is particularly important. Third, if the merger reduces competition in urban markets, and reducing competitors from three to two certainly suggests such a threat, there is little comfort in pegging prices in rural areas to what may be less-than-competitive prices in urban areas. Most important, the suggestion that mergers to monopoly and duopoly should escape challenge if the merged companies promise not to abuse their market power is fundamentally inconsistent with U.S. antitrust enforcement. We depend on vigorous competition among rivals to produce reasonably priced and high quality products. The idea of substituting for competition the promises of the most sincere captains of industry is simply not the philosophy that we have pursued consistently in this country.

The proposed merger also raises troubling issues in the emerging broadband market—that is the provision of upgraded high-speed access to the Internet. In a series of proceedings—including those occasioned by the AOL/Time Warner merger[9] and the AT&T/Media One merger[10], the Antitrust Division, the FTC and the FCC have all sought to preserve competition in this extremely important new market. Congress has also been concerned that megamergers not lead to a situation in which high-speed access to the Internet will come under the control of one or a small handful of companies. This merger would threaten a potential monopoly in satellite broadband service.

Wired broadband technologies, such as cable and telephone connections ("DSL") have been slow to emerge in rural areas for many of the same reasons that these areas have limited cable penetration. There is not sufficient demand to insure more rapid development. Satellite broadband service provides the most viable technology that can bridge the digital divide in rural America. As noted, the merger of EchoStar and DirecTV would be a merger to monopoly for millions of rural consumers who, both today and tomorrow, have no alternative to DBS for broadband Internet as well as multi-channel video service.

Here, too, the merging parties argue that the merger, by increasing capacity and eliminating "duplication," will enable them to devote more capacity to rolling out

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[8] U.S. Department of Justice and Federal Trade Commission, REVISIONS TO HORIZONTAL MERGER GUIDELINES § 4 (1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997).

[9] *See American Online, Inc., and Time Warner, Inc.*: Analysis to Aid Public Comment, 65 Fed. Reg. 79861 (FTC Dec. 20, 2000); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 23 Comm. Reg. 157 (FCC Jan. 22, 2001).

[10] Proposed Final Judgment and Competitive Impact Statement: *United States v. AT&T Corp. and MediaOne Group, Inc.*, 65 Fed. Reg. 38584 (DOJ June 21, 2000); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor to AT&T Corp. Transferee*, 15 F.C.C.R. 9816 (FCC June 6, 2000).

broadband services. But the "duplication" they seek to eliminate is competition itself. Moreover, they would have to bear the burden of showing why the increase in capacity this merger would produce is necessary to bring out the services that both DirecTV and EchoStar have promised consumers for some time that each separately would provide.[11]

The aim of antitrust merger enforcement is to protect consumers from the abuses that follow from extreme concentration of market power. As proposed, the EchoStar-DirecTV merger certainly raises that threat, and consumers are left with CEO promises (and perhaps hard to enforce conduct remedies) to protect against abuses.

It may be that DirecTV is determined to exit the market—as it has every right to do. But without a facilities-based structural remedy that insures that consumers have roughly the same options they have now, this merger should not be permitted.

Chairman SENSENBRENNER. Robert Phillips, president and CEO of the National Rural Telecommunications Cooperative.

TESTIMONY OF BOB PHILLIPS, PRESIDENT AND CEO, NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Mr. PHILLIPS. Thank you, Mr. Chairman. And good morning, Ranking Representative Conyers and other Members of the Committee. It is a privilege to appear before you today to represent the views of the National Rural Telecommunications Cooperative, or NRTC, regarding the proposed merger of EchoStar and DirecTV, and its impacts on the multichannel video distribution market.

NRTC believes that this merger, as proposed, is bad for competition in rural America because it creates a rural monopoly, it eliminates choice, and it eliminates competition.

From our founding in 1986 it has been NRTC's focus to bring advanced rural telecommunications services to all of those who live and work in rural America. NRTC has also been involved in the satellite television business, starting with large dish satellite service, or C-band, including our own investment of our members and utilities in excess of $100 million to help launch the DirecTV service.

Today, NRTC, through its participating members, who are rural electric cooperatives and rural telephone cooperatives and companies as well as affiliates like Pegasus satellite, serve more than 1.8 million rural subscribers with DirecTV.

As I said, this merger does eliminate competition for rural consumers. Literally millions of rural homes have no access to cable television or digital cable television services. That makes satellite their only option for video programming.

And I did bring a map today which is a blow-up of the chart which I included in my testimony, showing on a state-by-state basis how tens of millions of people have no choice for video programming other than satellite.

Today, these consumers can choose between EchoStar's dish service or DirecTV. If this merger is approved, their choices go from those two providers to one. The proponents of this two to one merger argue that promises will suffice for competition and that the

[11] For example, an expert retained by the DOJ in a recent case regarding the constitutionality of must-carry provisions in the Satellite Home Viewer Improvement Act opined that both EchoStar and DirecTV could use currently available technology to significantly increase their ability to provide local programming to additional markets. *See* Declaration of Roger J. Rusch, *Satellite Broadcasting & Communications Ass'n v. FCC et al.*, No. 00-1571-A (E.D. Va. dated May 23, 2001). If the DOJ's expert is correct, one of the principal efficiencies advanced by EchoStar and DirecTV in support of their merger could be achieved by either company alone. Efficiencies achievable by less anticompetitive means do not justify a merger to monopoly or near monopoly.

overall benefits of the merger will outweigh the lack of choice in providers from this combination. Instead of the vibrant and competitive satellite TV marketplace which protects competition and choice, EchoStar promises to protect rural Americans by charging them the same price as those who live in urban America.

As the professor indicated, there aren't any price guarantees that solve this monopoly problem. It is hard, if not next to impossible, to enforce any such promise. And price is not the only issue when you eliminate choice. What about service, quality, or the choice in programming content?

The proponents of the merger would also have you believe that another benefit is increased delivery of local TV signals via satellite delivery. They suggest that with the approval of this merger, they will increase their capacity that is going to be dedicated to bringing local-to-local service, but nowhere near all 210 local TV markets. A DOJ witness has testified that each of these merger applicants, DirecTV and EchoStar, independently has sufficient FCC licenses and capacity to separately deliver all 210 TV markets.

By approving this merger, it will remove all competitive pressure to expand coverage and it will leave one company with the sole power to decide whether or not to deliver all 210 TV markets.

This merger also has some very far-reaching implications for rural America beyond video programming. The future of satellite-delivered broadband Internet access to rural America is threatened by this proposed merger. Currently, there are already two providers bringing satellite broadband, DiRECWAY, which is owned by DirecTV, and StarBand, which is controlled by EchoStar.

Again, the merger applicants suggest to you that forming one broadband provider, creating another monopoly is in the best interest of rural Americans. I fail to see how that will benefit consumers. Just a few years ago there were four competitors in the satellite industry. First, Hughes bought Primestar, then Hughes bought USSB; and now, if EchoStar is permitted to buy Hughes, there will be only one. And Congressmen, one supplier is a very lonely number for rural Americans.

As currently proposed, this merger of two highly successful DBS companies with a huge market value is so anticompetitive with respect to rural America that it should not be permitted in its current form. If this merger is permitted in its current form, it would appear that there is little to nothing left to antitrust policy and enforcement in the first years of this 21st century.

I am very grateful for your attention, and I do look forward to answering your questions.

[The prepared statement of Mr. Phillips follows:]

PREPARED STATEMENT OF BOB PHILLIPS

INTRODUCTION

Good morning. Mr. Chairman, Ranking Representative Conyers and other Members of the Committee, it is a privilege to appear before you to discuss direct broadcast satellite service and competition in the multichannel video distribution market. I will focus upon the impact on rural Americans of the proposed merger between EchoStar and Hughes Electronics/DirecTV.

My name is Bob Phillips, and I am the President and CEO of the National Rural Telecommunications Cooperative (NRTC). From our founding in 1986, NRTC's primary mission has been to bring the same state-of-the-art telecommunications services often found in urban areas to those who live and work in rural America.

NRTC BACKGROUND

As a national cooperative, NRTC provides our members and affiliates with comprehensive technology solutions that include product research and development, technical support, marketing assistance, industry representation, and product and service distribution.

NRTC was founded in 1986 to bring valuable telecommunications services to rural communities, just as our rural electric and telephone members helped bring electricity and telephone service to rural America in the 1930s, 40s and 50s.

NRTC first entered the satellite business by offering C-band (large dish) television service to rural communities. In the early 1990s, we forged an important partnership with DirecTV, Inc., a unit of Hughes Electronics Corporation. NRTC and its members invested more than $100 million toward launching DirecTV—the nation's first and most successful high-power direct broadcast satellite (DBS) system. This money and NRTC's participation was absolutely critical to the launch of DirecTV's business. In return for this necessary seed capital, NRTC's participating members and affiliates became the local distribution channel for this valuable service in certain portions of rural America. Today, NRTC, through its participating members and affiliates, including Pegasus, serves more than 1.8 million rural consumers with DirecTV service, representing nearly 20 percent of DirecTV's entire subscriber base.

NRTC-A COOPERATIVE

NRTC operates on a not-for-profit basis. We serve our members and affiliates who in turn provide the retail DirecTV service to the rural marketplace.

NRTC supports more than 1,000 rural utilities and affiliates located in 46 states. Many of these entities deliver telecommunications and information technology solutions to their communities. These NRTC members and affiliates serve more than 35 million customers in areas of the country that have been historically unserved or under-served by traditional utilities and other businesses.

Building on a foundation of community service, we work, as a cooperative, to ensure that all rural Americans share equally in the benefits of the digital age. We see ourselves, at NRTC, as builders, and we want to continue this tradition.

I also want to say that I have a great deal of respect for people who are builders, and accordingly, I want to acknowledge Mr. Ergen. He has built a very strong and important business in EchoStar. We are out there directly competing with his company each day. He aggressively prices and provides service to consumers. He keeps us on our toes. We respect him as a competitor. If this merger is successful, however, he will also be NRTC's exclusive wholesale supplier—and that raises serious concerns for our rural customers by reducing the current choice of satellite services from two to one, and by eliminating all effective and meaningful competition in rural America.

FOR MANY AMERICANS WITH NO ACCESS TO DIGITAL CABLE TELEVISION THIS PROPOSED MERGER CREATES A MONOPOLY PROVIDER OF SERVICES

Rural America includes many areas where *no* cable company exists to provide video television service. In other areas, only analog cable is available. In both instances, consumers must rely solely upon satellite services for delivery of digital programming. For these rural Americans, the merger of the number one and number two competitors in the high powered digital direct broadcast satellite (DBS) market, without any third provider, creates a monopoly. We believe the Committee should carefully weigh the following facts:

- As many as 19% of U.S. housing units have no access to cable TV service, according to a U.S. Department of Commerce National Telecommunications and Information Administration ("NTIA") and the Rural Utilities Service ("RUS") Report issued in April of 2000. On October 30, 2001, *The New York Times* estimated that 22% of U.S. homes did not have access to a video cable provider. A copy of the report and article are attached to my testimony. Whether it is 19% or 22%, it still means tens of millions of American households will be without competition.
- The same *New York Times* article estimated that 20 states have less than 70% cable access. For these areas the DirecTV-EchoStar merger, if permitted, creates a monopoly of one, which will choose the service offerings, pricing and the content of all programming packages.

These facts are beginning to generate concerns on the part of state antitrust officials and others impacted by the potential merger. For example, Missouri's Attorney General, Mr. Jay Nixon, has recently written to U.S. Attorney General Ashcroft, expressing his office's concern that nearly 850,000 homes in his state—fully one-third of Missouri's population—must rely solely upon the proposed merged company for multi-channel video services if the merger is permitted.

IF THIS MERGER IS PERMITTED, DELIVERY OF BROADBAND INTERNET SERVICES TO RURAL AMERICA WILL BE SEVERELY IMPACTED

The future of Broadband Internet access to rural America is threatened by this proposed merger. There are three likely sources of broadband services in rural America—satellite, cable or telephone companies. Because of the low population density in many areas of rural America, satellite is the only potential broadband provider in much of rural America. Portions of rural America will remain on the wrong side of the digital divide if Broadband Internet isn't available at reasonable costs. This proposed merger, if approved, will leave one company controlling the availability, breadth and cost of nearly all satellite Broadband Internet (and video) services to rural America. There are currently two providers of this service in the market today, Direcway (owned by Hughes), and Starband (controlled by EchoStar). The merger would create a monopoly in a market that is still forming. The next generation of Ka-band service, which will have greater capacity, faster speeds and lower costs—if offered in a competitive market—will be dominated by the proposed merged entity. Any other competitors are likely to be frozen out of the market. There is already evidence that this is occurring. Meanwhile, EchoStar just completed its purchase of 90% of Visionstar, another potential Ka-band provider. The market reality is that any satellite broadband provider also needs to offer video services. Without video competition, there will be no broadband competition. Said differently, if this merger is approved as proposed, all roads will lead to EchoStar.

ECHOSTAR AND HUGHES' CLAIMS OF POTENTIAL PRICE GUARANTEES TO RURAL AMERICA ARE CURRENTLY MEANINGLESS AND UNENFORCEABLE

Prices of digital video services will go up in rural America because of this merger. Whether it be video or broadband service, if there is no effective competition, prices will be set by the monopoly provider. The claim has been made that the new monopoly will chose to sell its video service at the same price in rural America as it does in urban areas where there is competition. These half made promises of price guarantees are no substitute for genuine competition.

EchoStar and Hughes have made claims they may extend pricing in Manhattan, Chicago and Los Angeles to customers in rural Missouri, Texas, Virginia and Wisconsin. This promise is supposed to mollify the concerns of your rural constituents who will find themselves in a monopolistic world regarding video and broadband services. But setting that concern aside, no legally enforceable promise has been made. If the Members of this Committee, the antitrust authorities of the Justice Department, and the FCC's Commissioners are to take these representations seriously, Hughes and EchoStar should make their half promise more definite.

Will the proposed merged entity promise to set rural prices at the level of its lowest urban prices? Will the proposed merged entity provide rural consumers new services, such as broadband services, at the lowest urban price? If the proposed merged entity provides urban America with free installation for a thirty day promotion, will rural Americans benefit from the offer?

Currently the set top box technologies used by DirecTV and EchoStar are incompatible, and the customers' dishes are pointed towards different satellites. Will the proposed merged entity really provide new set top boxes and repoint consumers' dishes at satellites for no cost to the consumer as they have implied? We have estimated that the cost of this switchout will be in excess of $5–6 billion, although we have seen much smaller cost estimates proposed. We believe having accurate cost estimates here is critical, because promises to pay without a direct or indirect contribution from the consumers will become increasingly unrealistic as the cost goes up. Does anyone really think the consumers will not be charged, directly or indirectly, for these multi-billion dollar merger related costs? We also wonder if anyone has fully assessed the massive consumer disruption which will be caused by the proposed switchout.

We believe enforcement of the half promise about pricing is a potentially insurmountable problem. No agency of this government is currently enforcing such a promise. For these reasons, we at NRTC believe this promise has been made for its appealing nature, not because it ensures meaningful protection for rural Americans.

PRICE ISN'T EVERYTHING

But even if some form of "universal pricing" can meet the requirement for enforceability and realism, it is only one issue of many that concerns consumers. We know our customers. They are not solely concerned with price alone. Quality of service is equally important. If a subscriber's system is broken, they want it fixed. If a subscriber has a question about his billing, he wants it fixed. Service under monopolies traditionally declines because of the lack of competition. If you can't go anywhere else, there is no economic imperative to provide good service. No promise solves this problem.

Today's pre-merger competitive marketplace protects the consumer. No price solution, no matter how construed or implemented, can substitute for the choice and competition that exists today.

ONE SOURCE OF PROGRAMMING IN RURAL AMERICA IS NOT ENOUGH

Currently, DirecTV and EchoStar each provide alternative video programming. If the merger is approved, rural Americans will only be able to see what DirecTV chooses to deliver. Will certain news programs be made unavailable? Will certain program sources be kept out of reach for any reason? Two or more sources of programming protects access, preserves choice, and assures competition for rural Americans.

Just last week EchoStar announced they would no longer offer ESPN Classic or ABC Family channels. What happens if EchoStar decides other programming—such as CNN, HBO or C-Span—costs them too much? Where can rural residents go for that programming?

LOCAL-TO-LOCAL COVERAGE IS IMPORTANT,
BUT THIS MERGER CANNOT BE JUSTIFIED BY ITS PROMISED DELIVERY

There are only three U.S. orbital locations capable of nationwide service (aka "CONUS"—for Continental U.S. frequencies), and they are located at 101° west longitude (WL), 110° WL and 119° WL. Each CONUS slot is authorized to utilize up to 32 frequencies, for a total of 96 total DBS frequencies which can reach the whole country. Today, DirecTV has 46 CONUS frequencies, and EchoStar has 50.

Earlier this year, an expert chosen by the U.S. Department of Justice, Mr. Roger J. Rusch, publicly stated that DirecTV and EchoStar are the "two dominant DBS providers in the United States" who collectively own all three of the most desirable satellite orbital locations for broadcasting video services. This Department of Justice expert testified in a written declaration that the two DBS providers could retransmit all high power television stations in the U.S. to local communities using existing technology. He further stated that the dedicated use of as few as 12 frequencies could be utilized by each company today to distribute all 1475 local television stations to local communities. A copy of this Department of Justice affidavit is attached to my formal testimony. Therefore, one of the major claimed benefits of this merger—the expanded provision of local-to-local coverage—could be done by both companies individually today, according to the U.S. Department of Justice's own expert. Based upon this analysis, the merger is not necessary to expand local-to-local coverage since DirecTV and EchoStar each have enough spectrum to offer all the local channels. They have chosen not to do so.

Apart from the Department of Justice view, the proposed merged entity has indicated it will increase on a selective basis local-to-local coverage. Which specific markets will be receiving local-to-local services is not set in stone or guaranteed at this time. Any expansion of local-to-local service is laudable, but it leaves those designated market areas (DMAs) that are not served without coverage. No promise has been made to these citizens about when, or even if, they can receive service. On the other hand, competition between an independent EchoStar and an independent DirecTV is more likely to yield coverage for all local-to-local broadcasts as they aggressively compete for new subscribers by offering highly desirable local programming. Provision of such broadcasts has been an important differentiator in their respective service offerings. If the economics are not there today to encourage service to the last 100 marketplaces, the monopoly that results will have no reason to extend service in the future.

PAST MONOPOLY CLAIMS BY ECHOSTAR AGAINST ITS PROPOSED
MERGER PARTNER MERIT CAREFUL REVIEW

As recently as two months ago, EchoStar was engaged in a lawsuit which accused DirecTV of being a monopoly that repeatedly abused its monopoly power. Attached to my testimony you will find a copy of EchoStar's complaint against DirecTV. I believe you will be particularly interested in reviewing EchoStar's characterization of the uniqueness of the DBS marketplace and their allegations of DirecTV's abuse of its power which permeate the document. Of course, the proposed merger partners dismissed this suit when they decided to marry their corporations. But if DirecTV constituted a monopoly, please think carefully about the resulting single entity's overwhelming market power.

NORTHPOINT IS NOT AN ANSWER TO RURAL COMPETITIVE NEEDS

Northpoint is a start-up company with no operating history, no revenue, no experience delivering its proposed service, and no FCC license. It is seeking a terrestrial license to operate in the same Ku-band spectrum as EchoStar and DirecTV, which have opposed the request. It would operate somewhat similar to MMDS, using large antenna towers which could be viewed by households with a clear line of site to the antennas. There are several significant impediments to Northpoint ever coming to market.

One main impediment to Northpoint coming to market is that its technology interferes with DirecTV's and EchoStar's DBS signal. An independent study commissioned by the Congress and the FCC was performed on Northpoint by the MITRE Corp. That study found Northpoint's technology caused interference with a customer's reception from satellite services. It further found that the interference could be reduced if certain mitigation measures were undertaken, some of which are quite costly. It is unclear whether Northpoint has sufficient financing to undertake these remedial measures.

Another significant impediment is that Northpoint's FCC application seeks a license for free, instead of under the FCC's usual method of auctioning off valuable spectrum. Northpoint's CEO has intimated that the company cannot afford to roll out its product if it has to pay for the spectrum. It is unlikely that the FCC will, or should, give away valuable spectrum.

Even if Northpoint obtains a license and makes it to market, which is speculative at best, it is unlikely that Northpoint would be a significant or effective competitor in rural America because of the high costs for building large antenna towers that would serve very few rural households.

ANTITRUST LAW SHOULD BLOCK THIS MERGER AS PROPOSED

Claims that a merger will generate efficiencies in one market cannot justify or offset anti-competitive effects created by that merger in a separate market. This conclusion follows from the language of Section 7 of the Clayton Act, which prohibits mergers or acquisitions which may substantially lessen competition ". . . in any line of commerce or . . . in any section of the country . . ." Thus, Section 7 presents a legislative conclusion that one section of the country will not be sacrificed to anti-competitive effects in order to generate a benefit for a different section of the country. This hearing reaffirms that conclusion in its own way.

This statutory language was relied upon by the United States Supreme Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), where the Court explained that a merger leading to anti-competitive effects in one portion of the country could not be justified by arguable pro-competitive benefits to another section of the country. The Court stated: "If anti-competitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader." The Supreme Court enjoined the proposed merger.

The area of effective competition is the geographic area where customers can practically turn for alternative sources of the product. Anti-competitive effects in one market, such as rural America, cannot be shrugged off or disregarded, even if there is allegedly a benefit in another market.

CONCLUSION

Just a few years ago there were four competitors in the satellite market. Then Hughes bought Primestar. Hughes then bought USSB. If EchoStar is permitted to buy Hughes, there will be only one. One supplier is a lonely number for a rural consumer. As it is currently proposed, the merger of two highly successful DBS companies with huge market value is so anti-competitive with respect to rural America that it should not be permitted in its current form. If this merger is permitted in its current form, it would appear that there is little or nothing left to antitrust policy and enforcement in the first years of the 21st Century.

I am grateful for your attention and I look forward to responding to your questions.

Chairman SENSENBRENNER. Mr. Kimmelman.

TESTIMONY OF GENE KIMMELMAN, CONSUMERS UNION

Mr. KIMMELMAN. Thank you, Mr. Chairman.

On behalf of Consumers Union, the publisher of both print and on-line Consumer Reports, I appreciate the opportunity to testify today.

I hardly ever disagree on antitrust matters with Mr. Pitofsky, and I certainly don't disagree with his characterizations of the highly concentrated nature of the cable market and the satellite market. We have seen enormous mergers on both fronts.

But in his testimony, Mr. Pitofsky states, and I quote, "In a high-tech, dynamic, rapidly developing field like video programming delivery, competition in terms of quality and technology is particularly important."

That certainly makes sense. But he left out price. And let's look at the dynamic, rapidly developing field of video programming delivery. This is the marketplace that Congress deregulated in 1984, the cable market. And rates shot up about three times faster than inflation because of rapidly developing competition that did not arise.

In 1992, you saw the realities and reregulated. In 1996, Congress again stepped in and deregulated because of the hope of dynamic, rapidly developing competition in video delivery. Again, it has not arisen and prices are up 35 percent, on average, for cable since you passed the 1996 act. And the announced prices this year for cable rates going into 2002 are as high as, in St. Louis, 14 to 26 percent increase; Reno, Nevada, and Memphis, Tennessee, 15 percent increase; Boston, 12 percent; Syracuse, 11 percent; Atlanta and Austin, Texas, 10 percent even with two satellite companies in the market. These are clearly separate markets.

There clearly is a rural problem, as Mr. Pitofsky and Mr. Phillips have indicated, but in every place that is pale on Mr. Phillips' map, we need more competition to cable.

The antitrust discrepancy that Mr. Pitofsky described before, of the markets, their high concentration, isn't the entire story. When the Department of Justice last reviewed a satellite merger, the *Primestar case*, it described the cable industry as one of the most enduring monopolies in America. It said satellite did not compete against cable; however, it said satellite was the most likely potential competitor to cable. This all rings true. Satellite just is not there yet. And the Department of Justice blocked a cable-owned satellite venture in the hopes that satellite would compete.

So what does satellite need to compete better against cable? We know they need local broadcast channels. That is what most consumers watch more than half the time, and most consumers still do not have it from satellite. It is their upfront costs that are still dramatically more expensive than cable. They are not price competitive yet.

Now, will the EchoStar/DirecTV merger solve this problem? Not necessarily. Let's look at it more carefully in the light of what Mr. Pitofsky said.

Going from three to two in markets, or going from two to one, is clearly a problem. We need a new entrant and/or some structural fix. We have a new entrant waiting in the wings at the Federal Communications Commission, Northpoint Broadwave; and potentially other companies claim secondary licenses, secondary use of satellite spectrum that would enable them to enter markets all across this country in 1 to 3 years. The new player would mean we don't go three to two or two to one; we maintain the number of competitors.

The FCC has promised to make a decision on that before the end of this year. We hope that they do.

As a backup, we clearly would need a consent decree if this merger were ever to be approved that ensures that prices, service quality, terms and conditions for getting satellite hookup, satellite installation, dealing with satellite service problems, are handled everywhere on that map in the same way as they are in the most competitive market, so that we at least have price protection.

If that is too much regulation, I would suggest it is no more regulation than what Mr. Pitofsky did in his Time Warner-Turner or AOL Time Warner consent decrees at the Federal Trade Commission.

Finally, there is maybe a potential benefit—that is the gem of hope here—to get competition to cable from satellite. By combining satellite capacity, would it be possible to serve more communities with local broadcast channels, the most popular programming consumers want? The answer is obviously yes. Could they do more now? Possibly. But combining the two, requiring them to serve, as you have through your must-carry requirements, would yield a clear consumer benefit.

Could it possibly cut the costs of speeding up high-speed broadband service by satellite to compete against cable modem service or DSL? It should. That is what we hope, for consumers, the Department of Justice will review and the Federal Communications Commission will act on, so that rather than just taking a narrow antitrust view here, we have strict but creative antitrust enforcement and procompetitive competition policy so that consumers in the end see more competition and not less.

Thank you.

Chairman SENSENBRENNER. Thank you, Mr. Kimmelman.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN

Consumers Union[1] is extremely concerned about the enormous concentration of control over multichannel video distribution systems—predominantly cable and satellite—which has prevented the growth of vibrant competition.

Direct broadcast satellite (DBS) stands as the most likely competitor to today's cable monopolies. While further consolidation in the satellite industry could be dangerous to consumers, it also holds the potential to make satellite more competitive with cable monopolies. We believe that antitrust issues related to satellite mergers

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about goods, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 4 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

should be reviewed in the overall context of policies designed to foster more competition in the multichannel video market.

It is important to understand that, while antitrust is an excellent tool to prevent monopolization or substantial dilution of competition, it may do nothing to create new competition or explode existing monopolies. Consumers need both—strong antitrust enforcement and strong pro-competitive policies.

Satellite

Over the last three years, there has been a great deal of consolidation within the satellite TV industry. The number-one provider, DirecTV, bought two of its competitors, PrimeStar and United States Broadcasting. Meanwhile, the number-two company, EchoStar, acquired the assets of American Sky Broadcasting.[2]

Today, EchoStar and DirecTV serve nearly every home that has a satellite dish.[3] And now EchoStar is attempting to buy DirecTV.

If this merger is approved, it would combine the dominant players in the satellite TV market to become the second-largest pay-TV company in America, behind AT&T's combined cable ownings.

The potential antitrust problems presented by this merger are serious and substantial. Currently, most consumers have three choices for pay-TV services: EchoStar's Dish Network, DirecTV, or their local cable company. This merger would reduce their choices from three to two. For rural America, the prospects are even grimmer. Approximately 13 million homes in rural areas are not wired for cable TV.[4] These consumers can only choose between DirecTV and EchoStar. Thus, the merger would leave them with EchoStar as their only option.[5]

Therefore, Consumers Union believes that this proposed merger poses significant antitrust problems and must be rejected, unless the problems are adequately addressed before the merger is completed. Under certain circumstances, we also believe the merger could offer consumers some significant benefits, such as more local broadcast channels and better high-speed Internet options available via satellite. We believe that government approval should be contingent on specific market-opening preconditions and protections against anti-competitive practices. These would involve antitrust consent decree requirements to prevent monopolistic pricing and inferior service, plus Federal Communications Commission (FCC) action to encourage competition.

CABLE

To understand the full set of trade-offs related to this proposed merger, we believe that the issues surrounding satellite concentration should be viewed in the overall context of persistent cable monopoly dominating the multi-channel video programming market.

Sixteen percent of American households have satellite dishes, while about 68 percent have cable.[6] A substantial portion of satellite subscribers also purchase cable in order to receive local broadcast programming or to satisfy multiple TV viewing needs. Thus far, satellite has failed to provide price competition to cable.

Every year, cable rates keep going through the roof. In the five years since the Telecommunications Act became law, cable subscribers have seen their rates go up 35 percent. That's nearly three times the rate of inflation.[7] Cablevision recently announced a 7 percent rate hike, two weeks after AT&T announced a 7.4 percent hike.[8]

Unfortunately, the 1996 Telecommunications Act phased out cable rate regulation. It gave consumers the impression that cable competition would expand sooner rather than later, and cable prices would go down, not up.

The law assumed that the elimination of legal barriers to entering the cable business would unleash a torrent of competition from local telephone companies, electric utilities and others.

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[2] Hoffmeister, Sallie. "GM Deal to Create New Pay TV Giant," *Los Angeles Times*, Oct. 29, 2001.

[3] *FCC Seventh Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (CS Docket No. 00–132), January 8, 2001.

[4] *Advanced Telecommunications in America*, report by Rural Utilities Service and National Telecommunications and Information Administration.

[5] Beauprez, Jennifer. "Tech Town," *Denver Post*, November 4, 2001.

[6] *FCC Seventh Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (CS Docket No. 00–132), January 8, 2001.

[7] Bureau of Labor Statistic, consumer price indexes, October 2001.

[8] Berkowitz, Harry. "Cablevision Rates Rising Again," *Newsday*, November 21, 2001.

Unfortunately, it just hasn't happened. The local telephone companies have virtually abandoned their efforts to compete with cable,[9] and electric utilities have had difficulty breaking into the market. Without the benefit of regulations that prevent cable price gouging, only consumers in the few communities where two wire-line companies engage in head-to-head competition for cable services are receiving the benefits promised in the 1996 Act. FCC data show that head-to-head competition saves consumers 14 percent compared to prices charged by cable monopolies (where satellite service is also available), and independent research indicates that competition can save consumers as much as 32 percent on their cable bills.[10]

Unfortunately, two-wire towns are the exception to the rule in today's marketplace. Large companies that are well-positioned to block competition increasingly dominate the cable industry. Currently two companies (AT&T and AOL Time Warner) together own cable systems serving more than 50% of the nation's cable subscribers. In most places, the local cable company is the only cable company. As cable TV pioneer Ted Turner recently said: "I think it's sad we're losing so much diversity of thought and opinion. . . We're getting to the point where there's going to be only two cable companies left."[11]

Cable companies often argue that programming costs and capital outlays account for the increase in rates. But these arguments simply do not hold up under scrutiny.

For one, cable industry data show that a substantial portion of the increase in programming costs are offset by corresponding increases in advertising revenue. As programming gets more expensive, cable companies get more revenue from advertisers who run commercials during the programming.[12]

Secondly, the largest cable system operators have financial interests in about one-third of all national and regional programming. So when cable companies complain about having to pay more for programming that they partly own, some are simply taking money of the right pocket and putting it in the left pocket.

Even at the local level, the cable industry's complaint about rising programming costs does not hold water. Since the passage of the 1996 Act, cable revenues have increased much faster than costs. Since 1996, total revenues have increased by 50 percent, while operating revenues are up 43 percent.[13] Average operating revenues (total revenues minus operating costs) have actually increased by 32 percent.[14] Most notably, the revenues that are associated with the expansion of systems—advertising, pay-per-view and shopping services, advanced services and equipment—are up 123 percent.[15] The dollar value of revenue increases for new and expanded services since 1997 alone swamps the increase in programming costs. Virtually all of the increases in basic and expanded basic service revenues have been carried to cable's bottom line in the form of increases in operating profits.

COMPETITION

So how does satellite TV stack up against cable? Cable companies may contend that satellite is a serious rival, but evidence shows that, thus far, satellite is not an effective competitor to cable. For most consumers, satellite is still more expensive and less attractive than cable. Installation and multiple TV hookups make satellite significantly more costly than cable. In addition, poor satellite reception is a problem for some consumers in urban areas, and most consumers still cannot get all of their local TV stations from satellite.

If satellite can provide local channels in more areas and continue to bring down up-front equipment costs, it could be well-positioned to be the most likely competitor to cable in the future.

One of EchoStar's major arguments for a merger with DirecTV is that combining the dominant players of the satellite industry is the only way for them to compete head-to-head with the cable monopolies. We do not believe this combination alone would guarantee that satellite becomes an effective competitor to cable TV. However, the combined companies would have additional satellite capacity to beam local channels into more markets than they do now. They would also be able to reduce

[9] *FCC Seventh Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (CS Docket No. 00–132), January 8, 2001.

[10] Declaration of Thomas Hazlett, Ph.D. (Resident Scholar, American Enterprise Institute for Public Policy Research). *In the Matter of Applications of Northpoint USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. To Provide a Fixed Service in the 12.2–12.7 GHz Band.* (ET Docket No. 98–206).

[11] Patrizio, Andy. "Ted Turner Laments Cable Mergers," *Wired News*, November 28, 2001.

[12] *FCC Fifth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (CS Docket No. 98–102), December 17, 1998.

[13] *FCC Seventh Video Competition Report* at 1002, Table B-6.

[14] *Id.*

[15] *Id.*

costs per subscriber and possibly speed up the availability of high-speed Internet service in rural areas. Once again, all of these would increase the likelihood that satellite could become a price and service competitor to cable.

Nonetheless, the only way that antitrust and other competitive concerns about this merger can be addressed is to require the conditioning of the merger with two significant safeguards.

First, EchoStar should be required to implement a broad array of protections for rural subscribers. The company should have to agree to offer the same prices, terms, and conditions to consumers in rural areas as it does to consumers in more competitive areas. The same installation options, program packages, promotions, and customer service that EchoStar provides in the closest, most competitive markets would then be available where consumers have cable and only one satellite choice.

The second safeguard we would suggest is aimed at improving competition. If consumers are going to lose one competitor in the multichannel video market, particularly when it means unwired markets will go from two choices to one, the FCC should move forward to open the door to another competitor.

For example, Northpoint/Broadwave is a promising potential competitor to both cable and satellite TV. It is trying to secure a license for its service, but it is caught in a regulatory morass at the FCC. Two of the companies that have pressed the FCC to reject the application are the companies that could see the stiffest competition—EchoStar and AT&T.[16]

The addition of Northpoint/Broadwave or a comparable firm to the marketplace could offset the loss of a satellite competitor as a result of this merger. Therefore, we are asking the FCC to approve licensing of Northpoint/Broadwave—if the service can be provided without interfering with satellite service—before the antitrust officials complete their review of this merger.

In conclusion, I would like to recall the last telecommunications merger to receive this kind of attention from Congress—the merger of America Online and Time Warner. Some of you probably remember the antitrust concerns that were raised when AOL first unveiled its merger plans.

I know that former FTC Chairman Pitofsky remembers them well. And thanks to his insight and leadership at the FTC, that merger was transformed from a potential threat to consumers to a model for the protection of consumers.

That merger was very different in many ways from the merger under discussion here today. But they do have at least two things in common.

Like the merger of AOL and Time Warner, the merger of EchoStar and DirecTV presents serious problems that could be dangerous to consumers. But as the government's approval of AOL Time Warner demonstrated, problems can be fixed if the companies and federal officials are willing to do so.

Rather than reject this proposal out of hand, we would urge the federal government to seize an opportunity to improve consumers' standing in the marketplace and bring some sorely-needed competition to the multi-channel video market.

Chairman SENSENBRENNER. The questions will be under the 5-minute rule which, given the turnout by Members of the Committee, will be strictly enforced.

The Chair has noted the order in which Members have appeared on each side of the aisle and will recognize Members in the order in which they have appeared, starting with myself and Mr. Conyers.

Mr. Ergen, I have reviewed both your testimony and the amended complaint that was filed on April 5th, 2001, in the Federal Court for the District of Colorado in the action entitled *EchoStar* v. *DirecTV, et al.*, and I think your testimony is inconsistent, at least in the implication with what you allege to the Federal Court in the following respect.

In your testimony you claim that C-band technology, which is the one that uses the big dish, is one of several competitors to DBS. However, in paragraph 30 of your amended complaint in your antitrust lawsuit against DirecTV, you stated that C-band technology is largely obsolete; and two paragraphs later, in paragraph 32, you

[16] "FCC and FTC," *Warren's Cable Regulation Monitor*, April 9, 2001.

note that there are only about 110,000 remaining C-band subscribers.

Is your testimony accurate when you portray C-band as a credible competitor to high-powered DBS?

Mr. ERGEN. Yes, it is in rural America. Certainly not a competitor in the urban areas because of the size of the dish. And I believe there are approximately a million, 1 million C-band customers today. I don't know the exact number. But I think it is closer to a million—certainly closer to a million than a hundred thousand.

So clearly—I might add that while we have a lot of different numbers that are being thrown at the Committee here today, I think the FCC, who really is the branch of the government that defines this, has found that 97—approximately 97 percent of America is passed by cable.

A lot of the graphs and charts that we have here don't consider the MDU, the multi-unit dwelling cable passings, and that is why their numbers may be a little bit different. But the FCC, in a 2001 definitive study, found it to be 97 percent.

Chairman SENSENBRENNER. Well, let me quote directly from the amended complaint which EchoStar filed in the court in Colorado.

Paragraph 32, quote, "The first and only significant provider of medium-powered DBS equipment and programming was Primestar, which DirecTV acquired in 1999. At its peak, Primestar offered approximately 140 channels to 1.8 million subscribers. Although Primestar currently continues limited operations, its subscribers now number fewer than 110,000."

Then it says, "DirecTV has been attempting to upgrade Primestar customers through its own high-powered DBS service. At present, Primestar is the only medium-powered DBS service available in the United States and no new medium-powered DBS service is expected to be developed." And yet, after telling the court that, what you said in your testimony is that C-band is a competitor.

Now, how can you say that C-band is an effective competitor when they only have 110,000 subscribers? You know, I don't understand that.

Mr. ERGEN. Let me please answer.

With all due respect, I think, Mr. Chairman, that you have gotten two technologies mixed up here. C-band is the large 10-foot dish that I am talking about in my testimony that has approximately a million subscribers. The SBCA and other people have statistics for that. I don't know exactly the number; it may be a little bit less than a million subscribers today.

The Primestar technology that you are talking about, per our filing in the court, is in fact a—a DBS-type service, which is a small dish. It is a medium-powered Ku-band service that was acquired by DirecTV, and there are fewer than—I believe there are probably not—clearly fewer than 100,000 subscribers there. But that is a little dish, and it is called Ku-band.

In my testimony, written testimony——

Chairman SENSENBRENNER. Excuse me. Mr. Ergen, my yellow light is on. You called C-band obsolete. And you have also called C-band as something that is declining. And that was in your filings with the court.

And now you are making it out that C-band, you know, is a major competitor to what you are proposing to do.

Now, you are being inconsistent with the court in Colorado and with this Committee; and I would urge you to figure out which is right and to let the Committee know, you know, whether your filings with the court are accurate or whether your testimony before the Committee was accurate.

My time is up. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. Pitofsky, you are here today testifying as an antitrust scholar, a hired lobbyist, or a member of Arnold & Porter?

Mr. PITOFSKY. Numbers one and three.

Mr. CONYERS. One and three, okay.

Well, they billed you as a professor at a university; and I should tell you that I am in touch with one of your brilliant scholars, Tom Campbell, who teaches antitrust law at yet another university. So his spirit hovers over us in this discussion.

Now, you didn't do that much for me when I told you about all of those black doctors that were being excluded from HMOs. Now you come up as the big trust-buster today.

You didn't do much when the Microsoft case came about. It got away from the FTC, and Antitrust had to take it over. Remember, it went to you first?

Mr. PITOFSKY. Not to me. I wasn't there.

Mr. CONYERS. You weren't there?

Mr. PITOFSKY. I was somewhere else.

Mr. CONYERS. Well, it went to FTC.

Now, what about, Federal monitoring of nationwide pricing is unwieldy? I think you had something to do with things like that when you were at the FTC; that was while you were there.

So, you know, let me ask you, suppose instead of EchoStar acquiring DirecTV, the purchaser was the company with monopoly control of satellite TV in Asia and Europe and was one of the largest content owners in the United States, controlling a major network, numerous cable TV properties, movies, numerous magazines and newspapers—I can't even count them. Is that your alternative?

Mr. PITOFSKY. No, it is not. It sounds familiar; the outline of the company you have described sounds like News Corp.

Mr. CONYERS. No, this is a hypothetical.

Mr. PITOFSKY. Hypothetical, of course.

Let me—two points. One is, I don't know enough about News Corp. I don't know the shape of their company or whether they compete here. So I have no opinion on that subject. Let me——

Mr. CONYERS. Okay.

Mr. PITOFSKY. But you did raise a question of whether I am being inconsistent in saying that the government shies away from regulatory orders.

I don't think so for the following reason: that where it is a very close call as to whether an arrangement will be anticompetitive or not—and we have had plenty of close calls—then I say, take efficiencies and other considerations into account, for example, a merger of six to five and five to four.

But when it is a merger of two to one, then I say, the efficiencies can't save it; and the unaccustomed government role of being a monitor of the marketplace, rather than relying on the free market to set prices and to ensure quality is the better—the better approach to go.

Where we went to a regulatory approach, it was because there were very substantial efficiencies, and it was a close call whether we bring the case at all.

Mr. CONYERS. Well, then, you don't think that News Corp. is—say, didn't EchoStar want you to represent them at one time, or didn't you consider it?

Mr. PITOFSKY. No, EchoStar never invited me or the firm to represent them.

Mr. CONYERS. Uh-huh. Well, you don't know much about this hypothetical firm that you attached a name to. And you are an antitrust expert, but this hasn't come to your attention about where this is likely to go if this doesn't happen?

All I am suggesting is that we may be between the devil and the deep blue sea.

Mr. PITOFSKY. You mean, if this deal crumbles maybe the next deal will be as bad or worse? I think there is something to that, Mr. Conyers, and I think that is the right way of thinking about this.

My answer is that any deal in this marketplace should ensure that consumers, especially consumers in areas that cable doesn't serve, are no worse off after the deal than they are today. And that means there have to be at least two facility-based competitors rifling each other and producing consumer benefits.

Sitting here now I have no idea how you would do that. My testimony today is with respect to the problems of the deal as proposed.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I would ask unanimous consent to submit for the record testimony by NCTA that will be given later today as an important perspective on defining the competitive market and also——

Chairman SENSENBRENNER. Without objection, it will be included.

[The information referred to follows:]

PREPARED STATEMENT OF ROBERT SACHS

INTRODUCTION

Mr. Chairman, members of the Subcommittee, my name is Robert Sachs and I am President and CEO of the National Cable & Telecommunications Association. Thank you for providing us with the opportunity to testify before your subcommittee regarding competition in the multichannel video market.

Mr. Chairman, competition in the multichannel video marketplace is vigorous and well established. Today, consumers can choose from a variety of multichannel video providers, including direct broadcast satellites (DBS), alternative broadband providers like RCN, phone companies, like Qwest and utilities, like Sigecom. Indeed, most consumers have a choice of at least three multichannel video providers. As a result of this competition, nearly 21 million consumers—almost 23 percent of subscription television customers—today obtain multichannel video programming from a source other than a cable operator.

To determine whether competition exists, one only need look at what's been happening in the marketplace since the passage of the 1996 Telecommunications Act. With respect to the marketplace for the delivery of video services, the answer to that question is clear. Video competition is fierce, leading to service enhancements and product innovation that inure to the benefit of consumers.

The cable industry responded to this competition and the regulatory stability created by the passage of the 1996 Act by embarking on a massive effort to upgrade facilities and launch new services. Since the passage of the '96 Act, the cable industry has invested roughly $55 billion to deploy broadband plant in order to offer a wide array of new advanced digital services, including digital video, high speed Internet access, cable telephony and interactive applications. The DBS industry, seeking to maintain its lead position in subscriber growth has responded to cable's investment by launching its own satellite delivered broadband services and obtaining exclusive sports programming.

COMPETITION IN THE VIDEO MARKET IS WELL ESTABLISHED AND GROWING STEADILY

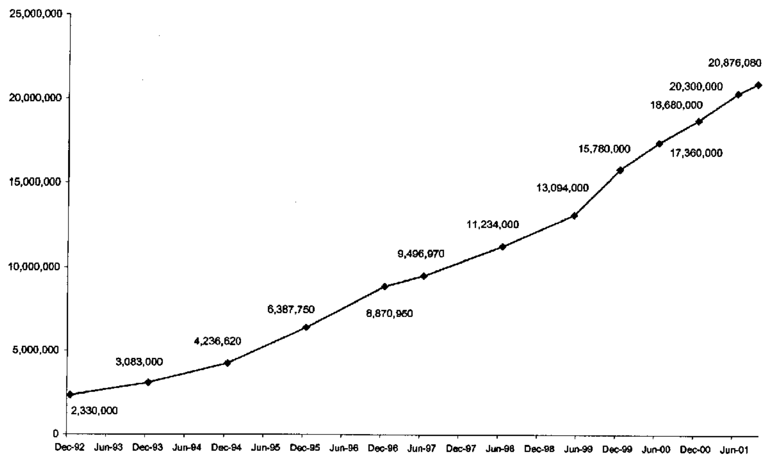
Market Share of Multichannel Video Program Distributors (MVPDs)
September 2001

MVPD	Subscribers (in Millions)	Percent of MVPD Market
DBS	16.73	18.05
C-Band	0.94	1.01
MMDS	0.62	0.67
SMATV	1.50	1.62
Local Telephone Companies	0.43	0.46
Broadband Competitors	0.66	0.71
Total Non-Cable	20.87	22.53
Cable	71.79	77.47
Total Multichannel Subscribers	92.66	100.00

Source: NCTA Research Department estimate based on data from A. C. Nielsen, Paul Kagan Associates, Cable World, SkyREPORT, and public reports of individual companies.

Today, cable competes with a wide range of satellite and terrestrial providers. Last year in its *Seventh Annual Report on Competition in the Video Marketplace*, the FCC found that "competitive alternatives and consumer choice continue to develop." Customers have increasingly flocked to these alternatives, with non-cable subscribership growing nearly *ten-fold* from an aggregate of 2,330,000 non-cable MVPD customers at the time of the 1992 Cable Act to more than 20,876,000 in September 2001.

Growth in Non Cable MVPD Subscribers
December 1992 - September 2001



While cable operators are clearly facing competition from a variety of sources, DBS in particular has proven itself as a competitive substitute for cable. With the passage of the Satellite Home Viewer Improvement Act (SHVIA) in November 1999, DBS companies can now retransmit local broadcast signals into their market of origin ("local-into-local"). As of November 2001, DirecTV and EchoStar made available local TV signals in 42 markets with over 65 million television households. When combined with their ability to offer hundreds of channels of digital video and CD quality sound, DBS companies compete vigorously with cable. The total number of DBS subscribers jumped from 14 million to 16.73 million between September 2000 and September 2001—a 19 percent annual growth rate. DirecTV now has more subscribers (10.4 million) than all but two cable operators—AT&T and AOL Time Warner—making it the third largest multichannel video provider in the U.S. The number two DBS provider, EchoStar, is the fifth largest MVPD and has more customers than all but three cable companies. Furthermore, DirecTV predicts that it will add 1-1.2 million new subscribers in 2002.[1] EchoStar forecasts net subscriber additions to total between 1.5 and 1.75 million in 2001, with similar gains predicted in 2002.[2]

[1] Video Business Online, "DirecTV parent sees 10% growth next year," www.videobusiness.com/news/111401.

[2] "EchoStar reports Q3 profit on subscriber growth," biz.yahoo.com/rf/011023/n23236477-

TOP 12 MULITCHANNEL VIDEO PROVIDERS

Company	Number of Subscribers
AT&T Broadband	13,750,000
Time Warner Cable	12,654,000
DirecTV	10,341,000
Comcast	8,437,000
Charter	6,970,000
Echostar	6,430,000
Cox Communications	6,206,737
Adelphia	5,693,035
Cablevision Systems	2,988,590
Mediacom	1,585,000
Insight	1,275,500
CableOne	760,000

Source: NCTA Research based on Company 3Q reports

Clearly, EchoStar and DirecTV are formidable competitors to cable and enjoy a number of competitive advantages. For example, DBS has been all digital from the start, giving it greater channel capacity than many cable systems, and has been able to achieve greater efficiencies in advertising and promotion with uniform national pricing. In addition, DBS companies are not subject to local franchise fees and taxes which can add so much as 15% to a cable customer's monthly bill, as they do in the District of Columbia. Also, DBS companies are not saddled with the costs of public access studios, institutional networks and free municipal cable hook-ups which are required by most cable franchise agreements.

On cable's side of the competitive ledger, upgraded cable systems can match the programming variety and choice that DBS companies offer, and provide consumers with 7 by 24 local customer service, interactive digital video, cable modem and cable telephony products.

The marketplace will determine which MVPD offers the better package of services with the best price and customer care. And individual consumers will determine which service offering best suits their particular needs. But what is undeniably clear is that consumers have multiple choices and are deciding among them with their pocket books.

NCTA does not take a position with regard to the proposed EchoStar/DirecTV merger. As indicated earlier, cable operators see the Dish Network and DirecTV as very formidable competitors, and compete vigorously with these satellite companies everyday. Moreover, with the additional channel capacity and operating efficiencies that would result from combining these two companies, we have no reason to believe that a 17 million subscriber satellite company will be any less formidable. Charlie Ergen is a fierce and respected competitor, as his track record amply demonstrates.

We believe that antitrust and public policy issues that have been raised about the proposed EchoStar/DirecTV merger are best left to resolution by expert agencies like the U.S. Department of Justice and Federal Communications Commission. NCTA represents cable operators serving over 90% of the nation's cable television customers and more than 200 cable program networks, as well as equipment suppliers and providers of other services to the cable industry. Many of these companies are also suppliers to the satellite industry. Individual member companies may choose to submit comments to the expert agencies, however, the cable industry, as an industry, does not plan to take a position on the merger.

Total dish subscribership (C-Band and DBS) now exceeds 15 percent in 41 states. According to SkyREPORT, Direct-to-Home (DTH) subscribers (all dish customers, including DBS and C-Band) grew from 15.3 million to 17.9 million between September 2000 and September 2001, an increase of 15.6 percent (versus 1 percent for cable). In 41 states, DTH satellite subscribership now exceeds 15 percent of all television homes. As of July 2001, DTH penetration exceeded 20 percent in 31 states, 25 percent in 16 states, 30 percent in 5 states, and 40 percent in 1 state. As mentioned, today most consumers have the choice of two DBS providers in addition to cable, and some have other multichannel video choices as well.

States with Direct-To-Home (DTH) Dish Penetration of Fifteen Percent or More (July 2001)

STATE	% OF TVHH w/DTH
Vermont	41.62
Montana	38.86
Wyoming	34.23
Mississippi	32.97
Arkansas	30.79
Idaho	29.26
North Carolina	28.34
North Dakota	28.10
Missouri	27.12
Kentucky	27.11
Utah	26.96
South Carolina	26.26
West Virginia	26.22
Texas	25.68
Indiana	25.14
New Mexico	25.11
Georgia	24.93
South Dakota	24.59
Tennessee	24.43
Alabama	24.15
Virginia	23.82
Oklahoma	23.48
Maine	23.21
Colorado	22.89
Iowa	22.68
Arizona	22.29
Wisconsin	21.96
Nebraska	21.38
Oregon	20.97
Minnesota	20.67
Kansas	20.65
Michigan	18.86
Florida	18.75
Louisiana	18.55
Washington	17.82
Ohio	16.76
Nevada	16.49
California	16.47
New Hampshire	16.45
Illinois	16.37
Delaware	15.05

Source: SkyTRENDS SkyMAP July 1, 2001; www.skyreport.com

While DBS has clearly become the chief competitor to cable, a growing number of new competitors have entered the marketplace. Companies like RCN, Knology, WideOpenWest, and others are providing consumers with competitive video and broadband services. Some utilities and incumbent local exchange carriers are also adding video programming to their product line-ups.

Mr. Chairman, the goal of multichannel video competition set by Congress in the 1992 Cable Act has been accomplished.

The Cable Industry's Response to Burgeoning Competition

Cable companies have responded to competition in the video market by aggressively upgrading their facilities and launching new services. Since passage of the Telecommunications Act of 1996, the cable industry has invested nearly $55 billion to deploy broadband plant in order to offer a wide array of advanced services, including digital video, digital music, high speed access to the Internet, and telephony. These upgrades involve rebuilding more than a million miles of cable plant and by year-end 2001, they will be approximately 80 percent complete. As of September 30, 2001, cable had 13.7 million digital video customers, 6.4 million high-speed data customers, and 1.5 million residential cable telephone customers.

Among the new options that cable customers have are digital video services. Cable program networks have already launched some 60 new digital channels, offering consumers additional choice and further program diversity. Examples include the *Biography Channel and History Channel International (from A&E); Science, Civilization, and Kids (from Discovery); Noggin, Nick Too, and Nickelodeon Games & Sports* (from Nickelodeon); and style. (from E!). There are six new Hispanic channels from Liberty Ca ãales, new music channels from MTV and BET, and separate channels targeting Indian, Italian, Arabic, Filipino, French, South Asian and Chinese viewers from *The International Channel*. There are also many new premium offerings from HBO *(HBO Family, ActionMAX, and ThrillerMAX)*, Showtime *(Showtime Extreme, Showtime Beyond)* and Starz Encore *(Family, Cinema, Movies for the Soul, and Adventure Zone)*.

Prices for Cable Programming Services

Despite escalating programming costs (especially higher sports rights fees) and billions spent on system upgrades, cable prices have remained relatively stable on a per-channel basis. For example, in its most recent report the Federal Communications Commission found that cable rates stayed unchanged in the year 2000 on a cost-per-channel basis *(Report on Cable Industry Prices*, FCC 01–49, MM Docket No. 92–266, released February 14, 2001). According to the same report, during the 12-month period ending July 1, 2000, average monthly prices for basic service tiers (BST), cable programming service tiers (CPST), and equipment increased by 5.8 percent. This represents a very slight increase (from 5.2 percent) for the year ending July 1, 1999—during which CPST prices *were subject to FCC regulation* from July 1, 1998, to March 31, 1999.

Industry critics will cite the fact that average monthly cable prices increased 5.8 percent compared to the inflation rate of 3.7 percent during the 12-month period ending July 1, 2000. But their criticism fails to take into account the fact that cable subscribers also received an average of three additional channels of BST and/or CPST programming. In fact, it is the competition from direct broadcast satellite services and other competitive broadband providers that has driven cable operators to upgrade their plant and add the new channels of programming consumers want.

Year-to-year comparisons which fail to consider the increased number of channels that operators provide to customers therefore create a misleading picture. In fact, data from the FCC and General Accounting Office show that the price per channel of cable's video services has *declined* since 1986 when adjusted for inflation:

Price Per Cable Channel, 1986 – 2000

	12/1/86	4/1/91	7/31/97	7/31/00
Nominal Price per Channel	$0.44	$0.53	$0.63	$0.66
Price Per Channel Adjusted for Inflation (in 2000 dollars)	$0.69	$0.68	$0.68	$0.66

Source: GAO Survey of Cable Television Rates and Services, July 1991; FCC Reports on Cable Industry Prices, released 12-15-97 and 2-14-01; Bureau of Labor Statistics, CPI-U.

This drop in real per-channel cable prices has occurred even though programming costs have skyrocketed since 1986. For example, between 1996 and 2001, the cable industry spent over $46 billion on basic and premium programming—nearly twice the $23.8 billion it spent during the previous six years.

CABLE SYSTEMS' PROGRAMMING EXPENDITURES:1986-2001

Year	Expenditures (in Billions)
1986	$2.030
1987	$2.289
1988	$2.599
1989	$2.918
1990	$3.195
1991	$3.463
1992	$3.811
1993	$4.000
1994	$4.370
1995	$4.963
1996	$5.656
1997	$6.413
1998	$7.466
1999	$8.000
2000	$8.882
2001	$9.800

Source: NCTA Research Department estimate, based on data from Paul Kagan Associates, Inc. and the U.S. Copyright Office.

Cable customers today are receiving more channels and better value for their dollar than ever before. And consumers are using their cable service more than ever. During primetime, ad-supported cable viewership increased from a 7.5 share during the 1985–1986 television season to a 41.7 share during the 2000/2001 television season, according to a Cabletelevision Advertising Bureau analysis of Nielsen data.

Expiration of Restrictions on Exclusive Contracts

Finally, I know this subcommittee has a particular interest in a provision of the 1992 Cable Act that imposed a 10-year restriction on the ability of vertically-integrated satellite cable programming networks to enter into exclusive contracts with cable operators. That restriction is scheduled to sunset in October 2002, unless the FCC finds that "such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."

The prohibition on the ability of vertically integrated programmers to enter into exclusive contracts was enacted in a very different environment. As my testimony indicates, the competitive landscape in the multichannel video market place has changed dramatically since then. In 1992, DBS had no subscribers. Today, DBS serves more than 17 million customers. In 1992, cable operators served 95% of all MVPD subscribers. Today, cable serves less than 78% of multichannel video customers.

And, in a total turnaround of circumstances, the most valuable exclusive rights in subscription television—to the NFL's Sunday afternoon football package—are held by DirecTV, the third largest MVPD. Regulations that were established during a period when there were significantly fewer multichannel video programming alternatives for consumers should be allowed to expire in a competitive environment. In limiting the restriction on exclusive contracts for 10 years, Congress recognized that a competitive marketplace is preferable to regulation. Prolonging the ban disserves competition and diversity by disincenting cable operators and their competitors to develop differentiated programming services.

The dramatic growth over the last decade in the number of multichannel customers subscribing to alternatives to cable is only part of the picture. The increase in diverse program services in which cable operators have *no* ownership interest has totally changed the landscape from 1992. In 1992, there were only 45 non-vertically integrated satellite-delivered services. Today, there are more than 200 national satellite delivered services that have no cable ownership. These networks compete with vertically-integrated networks for viewers, offering a variety of programming genres, such as news, children's, music and general interest programming, among others. While nearly half of all program services were vertically integrated in 1992, that percentage has dropped to 26% today. And no single cable company has ownership interests in more than 9% of satellite delivered programming services.

Year	Number of Vertically Integrated Services	*Percent of Vertically Integrated Services*	Number of Non-Vertically Integrated Services	*Percent of Non-Vertically Integrated Services*	Total Number of Satellite Delivered Programming Services
1992	42	*48%*	45	*52%*	87
1994	56	*53%*	50	*47%*	106
1995	66	*51%*	63	*49%*	129
1996	67	*46%*	80	*54%*	147
1997	68	*40%*	104	*60%*	172
1998	95	*39%*	150	*61%*	245
1999	104	*37%*	179	*63%*	283
2000	99	*35%*	182	*65%*	281
2001	73	*26%*	208	*74%*	281

Source: 1999-2000 FCC Annual Competition Reports; NCTA Research

In contrast, major media conglomerates like Disney, General Electric, Viacom, and News Corp (who respectively own the ABC, NBC, CBS and Fox broadcast networks), are increasing their ownership of cable networks. Each of the major commercial broadcast TV networks today is owned by a media company that has financial interests in 10 to 20 cable networks. Some are nationally distributed channels like CNBC, while others are regional channels like Fox Sports Net. And, as the following chart shows, the stable of broadcast-owned cable networks includes some of the most powerful brands in television, among them ESPN, The Disney Channel, MTV, VH-1, Nickelodeon, Lifetime, the History Channel, and Showtime Networks.

November 2001

Broadcast Network Investments in Cable Networks

General Electric/NBC

CNBC

Partial Ownership:
A&E
AMC
Biography Channel
Bravo
Fox Sports Net (regional sports networks)
History Channel
History Channel International
Independent Film Channel
MSNBC
MuchMusic
Valuevision
WE: Women's Entertainment

Viacom/CBS/UPN

BET Holdings: BET, BET Action Pay-Per-View, BET on Jazz, BET Gospel
The Box
CMT (Country Music Television)
Flix
MTV
MTV2
Nickelodeon/Nick at Nite
TV Land
VH1
Showtime
The Movie Channel
TNN: The National Network
The Suite (digital networks): Noggin, Nickelodeon GAS, Nick Too, M2, MTV X, MTV S, VH1 Smooth, VH1 Country, VH1 Soul

Partial Ownership:
Comedy Central
Sundance Channel

News Corporation/Fox

Fox Movie Channel
Fox News
Fox Sport Americas
Fox Sports World
FX

Partial Ownership:
Discovery Health
Fox Sports Net (regional sports networks)
National Geographic
Speedvision

Walt Disney/ABC

ABC Family
Disney Channel
SoapNet
Toon Disney

Partial Ownership:
A&E
Biography Channel
E!
ESPN
ESPN2
ESPNews
ESPN Classic
History Channel
History Channel International
Lifetime
Lifetime Movie Network
style

CONCLUSION

Mr. Chairman, consumers are benefiting from a rapid and unabated growth of competition in the video market. The convergence of video, voice, and data services in the digital broadband marketplace will only accelerate this trend. Cable will continue to be a leader in providing consumers with choice—not only in video services, but also in high speed Internet services and telephony. At the same time, consumers will be able to choose from among multiple vendors when making their purchases. In this highly competitive environment, companies that succeed will be those who offer consumers the best quality, value, and service. It is not possible to forecast precisely which will be most successful. But one thing that can be said with certainty is that American consumers are sure to be the ultimate winners.

Thank you again for this opportunity to present the cable industry's views. I would be happy to answer the Subcommittee's questions.

Mr. CANNON. I would ask unanimous consent to submit for the record, excerpts from the complaint filed in *EchoStar* v. *DirecTV*, which was filed on February 1st.

Chairman SENSENBRENNER. Without objection, so ordered as well.

[The information referred to follows:]

Excerpts from EchoStar v. DirecTV **U.S. District Court for the District of Colorado** **February 1, 2000**
"EchoStar and DTV are direct competitors in the High Power Direct Broadcast Satellite ("DBS") market." (page 2 of complaint)
"DTV's actions also harm consumers by essentially eliminating choice for High Power DBS service." (¶ 100)
"As a result, DTV can charge consumers exorbitant equipment and monthly service fees." (¶ 101)
"...each such arrangement further solidifies DTV's monopoly and makes further competitive abuses easier and more likely." (¶ 102)
"...High Power DBS offers a distinct advantage to satisfy this consumer demand [HDTV] and is able to offer programming features that match the capabilities of HDTV...that cannot be offered through ordinary cable or off-air broadcasts." (¶ 104)
"The relevant product market affected by [DTV's] conduct is the Direct Broadcast Satellite market, or the High Power DBS market..." (¶ 123)
"The characteristics of the High Power DBS market include but are not necessarily limited to: ......as well as multichannel premium services that are not available "over the air" or through cable..." (¶ 125)
"High Power DBS is the only multichannel television transmission service capable of serving the entire continental United States." (¶ 128)
"Millions of potential DBS customers also live in areas that do not have access to cable. For these millions of customers and potential customers, if there is no competition between DTV and DISH Network, there is no competition at all." (¶ 129)
"High Power DBS is the only choice for consumers desiring a broad range of premium sports broadcasting, such as access to all professional sports league games." (¶ 131)
"...consumers who want this programming option constitute a market only Satellite TV can serve." (¶ 132)
"...DTV has also foreclosed all competition in the market for Distant NFL games, and as such is able to charge a monopoly price for such games. [EchoStar's] injuries arise from the fact that DTV has stifled competition..." (¶ 136)
"DTV has eliminated substantial competition, consolidated and expanded its dominance of the High Power DBS market, reduced its need to compete in price and quality, and enhanced the prospect that DTV can charge monopoly prices for the sale of its services and equipment." (¶142)
"DTV has monopoly power in the High Power DBS service market..." (¶156)
"There is a dangerous probability that DTV will succeed in maintaining, preserving and/or consolidating its monopolistic power in the High Power DBS service market..." (¶166)

Mr. CANNON. Thank you.

Mr. Ergen, EchoStar currently provides local stations in 36 markets covering approximately 57 percent of the United States' TV households. If this deal goes through, you have promised to expand service to the top 100 markets, thereby serving only an additional 13 percent of U.S. TV households.

But haven't you filed in court an action to avoid rolling out additional local-to-local services required by the "satellite-must-carry" law which goes into in effect January 1, 2002?

Mr. ERGEN. Yes.

Just to correct the record, we have filed—by going to the top 100 cities, we would go to 85 percent of the market up from the 57 percent. So I believe that is about 38 percent more, not 13 percent more, 28—28 percent more homes.

Take a look at the graph to get an idea.

We have filed, through our trade association, the SBCA, a constitutional argument against the "must-carry" law that was enacted in 1999 under the SHVIA Act in the fact that we believe it violates our freedom of speech. And we have filed that. That would—if we were successful, then it might strike down the "must-carry" arguments.

I notice that the cable industry has made that same argument for many years.

Mr. CANNON. But—thank you.

Mr. Kimmelman, in an op-ed for Knight-Ridder Newspapers criticizing another telecommunications merger, you stated the following: "the urge to merge rather than compete has engulfed virtually all facets of telecommunications, leaving consumers paying inflated prices for entrenched monopolies that are inadequately disciplined by either market forces or regulation." .

This would be the first time I have heard that the Consumers Union has been supportive of the creation of a monopoly or duopoly. Just so we are aware of any conflicts, have you or your organization received any financial contributions from Mr. Ergen or his companies?

Mr. KIMMELMAN. Absolutely not.

Mr. CANNON. Thanks.

Mr. Phillips, how will NRTC fit into the future equation as a provider of satellite programming in rural America if this merger is approved? If EchoStar becomes your sole supplier, will you really be competing with EchoStar, as Mr. Ergen contends?

Mr. PHILLIPS. No, sir, Congressman, I don't believe that we will be competing. We have no facilities. We are not a supplier of satellite product; we are a distributor. We distribute DirecTV.

In this new world, where EchoStar owns all of the facilities and provides a very fulsome DirecTV package, we would be distributing some subset of those services up until he converts all of the subscribers. Then it is very unclear as to what we would be offering, because we provide DirecTV, and he has indicated his company will be providing DirecTV. And, his menu will be off of all three full CONUS transponders, and we will have just a subset of those services.

So we won't be in a position to differentiate our product, to provide anything different. We are simply going to be a distributor with a monopoly supplier, which will be Mr. Ergen.

Mr. CANNON. Thank you.

Mr. Pitofsky, I found your testimony compelling. Mr. Ergen, in his written statement, said some have attempted to suggest that the relevant product market for examining this proposed merger should be narrowly defined to encompass only satellite TV services, excluding cable.

Such a definition flies in the face of reality. But, as you noted in your testimony and as also, I think, the Wall Street Journal reported, Mr. Ergen and EchoStar TV defined the market exactly that way in an antitrust suit against DirecTV just a year ago.

Does treating DBS as a separate market for competitive purposes really fly in the face of reality, or do you believe that DOJ should define the relevant market for the merger that way?

Mr. PITOFSKY. This is a little bit of inside baseball. But let me just take a minute and thank you for your comments.

I think cable and satellite do compete. I think the Department of Justice is right, they are in one market. The real issue is whether there is a submarket.

The Supreme Court has recognized, our guidelines have recognized, that the two satellite companies compete so directly with each other in terms of price, quality, consumer preferences and so on that people are entitled to competition in the submarket as well as the overall market. So my answer is, the Department of Justice is right, cable and satellite compete.

But also others have been right in saying that there is a separate satellite submarket. I would go out on a limb and say, it is about as clear a submarket as I have ever seen.

Mr. CANNON. Great. Thank you.

I think my time is about to expire so I yield back what further remains, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. I want to join with you in welcoming our witnesses today. And thank each of them for their very informative testimony.

Let me say that as the Representative of a rural area, I very much appreciate all of the attention to rural concerns which this issue has brought; and I can only hope it proceeds into other legislative areas as time goes on.

As a Representative of one of the largest rural districts in the Eastern U.S., I can say that I am firmly convinced that this merger is in the interests of my constituents. They will broadly benefit from the new services this merger will make available, including local-into-local services that today are only provided in about 40 markets across the country, that upon this merger will be provided in 100 markets immediately.

They will also benefit broadly from the major investments and high-speed Internet access services that the merger will make available, because the—the cost of that service can be spread over many more subscribers and, therefore, be economical for the companies.

And the merger carries no disadvantages for rural residents. The same price for the programs will be charged everywhere, rural and urban markets alike; the same national programs will be provided everywhere, rural and urban markets alike.

The same customer service 800 number will be provided with no differentiation in the service provided, rural and urban alike, just as it is today. And on-premises customer installation, which is competitive today with independent retailers competing with each other in order to sell the service at the retail level and perform the installation, will remain competitive after this merger, just as it is today.

Mr. BOUCHER. So we in rural America gain broad benefits from this. My constituents, including those who do not have access to cable, are going to be much better off after this merger is completed than they are at the present time; and I want to put that squarely on the record, Mr. Chairman.

Mr. Ergen, I'd like to give you an opportunity to talk about some of the things you didn't have an opportunity to talk about in your opening statement because of time limitation; and, in particular, you might focus this morning on how the merger would enable you to deploy more rapidly high-speed Internet access services, perhaps because that service would become more economical for the company, given the fact that your costs can be spread out over a broader base of subscribers.

Mr. ERGEN. Well, I was first pleased to hear Mr. Pitofsky agree with us that the market was the total market and cable, and I think he correctly identifies, you know, potential submarkets there. But he would have us compete only in that submarket.

We're in a catch-22, a classic catch-22. Without this additional spectrum in this merger, we cannot effectively compete in that submarket at all because we don't have local to local. So it's only going to be cable in some of those markets, the rural markets. By combining the merger together, we're able to benefit those rural customers.

This is a merger—in my opinion, without this merger, we don't see broadband access in rural America in my lifetime. The cable industry is not going to go spend the money to go do it. The phone company is not going to go spend the money. We're going to have a digital divide, and my kids in rural America aren't going to get the same benefit as somebody in Boston. And that's just not right, and there's not enough government subsidies that are going to allow us to be able to do that. Our company has stepped up and said, we will invest billions of dollars and take the market risk that we can develop this technology to do it.

Second, you're never going to see local to local in Richmond and Roanoke without this merger. We don't have the capacity to do it. Many of the projects that people have talked about to be able to do it require advances in technology, speculative risk and tradeout of all equipment that is out there today. There is no question with enough time and money—enough time and money you can do just about anything in technology; but the markets—the last time I read the paper, we were in a recession. The capital markets are not out there for speculative ventures. Many companies, we see them going bankrupt day in and day out.

Our company has stepped up and said, we're willing to go out and continue to invest our capital to bring benefits to rural America and still protect them, protect them by a pricing mechanism. We may not have the best pricing mechanism. We're open to suggestion, that we can compete in urban markets.

Mr. BOUCHER. Mr. Ergen, my time is almost up. Let me ask you one specific question about high-speed Internet access deployment.

We heard one of the other witnesses, I think Mr. Phillips, mentioned that that service is available to a very limited extent today from Gillette, which is your service, and also from DiRECWAY, which is DirecTV service. Why is that not a fully deployed service, why is it not adequate, and how would this merger accelerate the deployment of high-speed Internet access delivered by satellite?

Let me just suggest that you talk a little bit, if you could, about——

Chairman SENSENBRENNER. The gentleman's time is expired.

Mr. BOUCHER [continuing]. The numbers that are involved in——

Chairman SENSENBRENNER. The gentleman's time is expired.

Mr. BOUCHER. Would you give the witness a chance to answer, Mr. Chairman?

Chairman SENSENBRENNER. Very briefly.

Mr. BOUCHER. Thank you.

Mr. ERGEN. Only about a hundred thousand customers—a little over a hundred thousand customers have it via satellite. The main reason is we don't have satellites that were designed for this purpose, and it would take billions of dollars to do it properly, and then we'd have to spread the cost over a wider base, which, if we can combine forces, will cut the cost in half to consumers.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, first of all, if we have not already done so, I'd like for the testimony from Northpoint Technology to be made a part of the record.

Chairman SENSENBRENNER. Without objection.

Mr. SMITH. Mr. Ergen, let me address a couple of questions to you. If you need to finish that glass of water, you're welcome to.

Mr. ERGEN. That's okay. I'll answer first.

Mr. SMITH. First of all, in your written testimony you mention that you have concerns that Northpoint Technology will have some harmful interference with DBS service. Wouldn't you agree that we ought to leave that up to the FCC?

Mr. ERGEN. Yes. I think that it's not—my concern is backed up by the MITRE report that was an independent testing facility that did it for the FCC. They did find significant interference, but I do believe that the FCC has—there may be mitigation techniques. I think they have enough information. And we have recently filed—you may not know this, Mr. Congressman, that we——

Mr. SMITH. Let me say you did answer my question. You agree that we ought to leave it up to the FCC. We hope that they'll decide by the end of the year, as Mr. Kimmelman suggested.

Let me go to my next question, and that is that you suggested also in your written testimony that, rather than share spectrum with you, that Northpoint should go to another band, but the FCC has already pointed out the disadvantages of doing that. And are you aware of that?

Mr. ERGEN. I believe that that band—there may be some disadvantages, but it is not the disadvantage of interfering with 15 million—or 16 million homes today. Again, I believe they have the information to make that decision, and we encourage them to do so.

Mr. SMITH. Because for the record, the FCC did say, “alternative bands are not as attractive. These bands either do not offer the same amount of spectrum, are encumbered by existing operations, impose higher equipment costs, or have significant propagation constraints.”

My next question, Mr. Ergen, goes directly to district concerns, and I represent a number of rural counties in Texas, and some of my constituents do not have access to cable. In fact, they can only get television reception either by DBS or by rabbit ears, the old fashioned way. While you contend that this merger is imperative for DBS to compete against cable, I am concerned that many of my constituents who—will have no access to cable.

In fact, in your antitrust suit against DirecTV, you stated, “millions of potential DBS customers also live in areas that do not have access to cable. For these millions of customers and potential customers, if there is no competition between DirecTV and EchoStar, there is no competition at all.”

Now what has changed in the last 20 months since you filed this suit, and how do I protect my constituents who are a part of the millions of customers you refer to should this merger be allowed?

Mr. ERGEN. Okay. First, all those customers in rural America, I hear from them every day, and they don’t have access to high-speed Internet. They don’t have access to high-definition television. They don’t have access to local channels, and that’s what they are asking for. They aren’t asking for higher prices, and that’s why we’ve come up with the uniform standard for nationwide pricing.

There has been a change in the last couple of years, since we did have the lawsuit with DirecTV, and that is the—two things have happened. Digital cable has been rolled out to the vast majority of cable subscribers, something that wasn’t true two years ago, and local-to-local legislation has passed that has changed the market where we can be a true competitive and a true substitute for cable in markets, and we don’t have the spectrum to do that. So that’s the two major changes.

Mr. SMITH. Okay. Mr. Ergen, to follow up on that, if this merger becomes reality, aren’t my constituents and the constituents of many other Members really going from two choices to one, and isn’t that by definition a monopoly that would give us concern?

Mr. ERGEN. I think their choices really are reduced. There certainly is still the C-band dish in those rural areas. There certainly are some wireless people out there, but I think, in general, their choices will be reduced, and that’s why I think it’s important that we put safeguards in place for those constituencies and those people who have less choice. And we’re prepared to do that.

We’ve come up with one alternative that we think makes sense. It’s been done in the AOL/Time Warner—it’s been done in other cases in similar circumstances. We’re open to suggestion if somebody has other ways, but I don’t think you can——

I think if you ask customers today—and again I talk to them every day—if you said, look, we’re going to give you nationwide pricing and one choice of a satellite provider, but we’re also going to be able to give you HDTV, your local service and broadband Internet access, they would prefer that to having two choices of satellite providers who give them half the channels than they otherwise would at about half the same price.

Mr. SMITH. Mr. Ergen, you mentioned the safeguards, but I want to refer you to Mr. Phillips' testimony that that is not exactly the preferred means to increase competition.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Ergen, this chart up here doesn't appear to have Norfolk, Virginia. Is that an oversight, or was Norfolk not covered?

Mr. ERGEN. We'll have to show you a different chart here that shows you the DMAs, but we would do the top hundred markets. We would commit to the top hundred markets and at least—and I don't know Norfolk's size, but I believe it's one of the top hundred markets. And we would commit to at least one city, no matter how small, in every State.

For example, Cheyenne, Wyoming, is only 25,000 people. We'll do that so that every State will participate.

Mr. SCOTT. I'm not interested in Cheyenne, Wyoming. I'm interested in Norfolk, Virginia. Should that be on the chart? Was that an oversight, or is it not one of the hundred?

Mr. ERGEN. Do you know—if it's one of the top hundred markets, we are committing to it.

Mr. SCOTT. Mr. Ergen, in your pricing of your service, is your pricing more a function of competition between satellite companies or cable?

Mr. ERGEN. I didn't hear the question.

They were—by the way, I did confirm that Norfolk and Norfolk—Richmond—and Richmond would be covered and Roanoke.

Mr. SCOTT. Thank you. Is your price via service more of a function of competition with cable or competition against another satellite company?

Mr. ERGEN. No. It's definitely a competition against cable. The vast majority of all our new customers come from cable or at one time had cable. A vast, vast majority of our customers come from that, and, again, cable now is digital. It has bounties out on our service, and we don't have some of the advantages that we had before. Cable has the broadband advantage over us and——

Mr. SCOTT. But after the competition with cable, you're going to give a nationwide price so everybody in the country would pay the same price for the service?

Mr. ERGEN. That is correct. Very similar to the way AOL prices their broadband service nationwide at one price.

Mr. SCOTT. And, technologically, how—you keep talking about serving a market. What do you need to do to serve a market? I mean, doesn't the satellite beam kind of hit all of America, and everybody who can get a satellite can get it? Is there anything technologically that would deny service to a particular area?

Mr. ERGEN. There's really two changes. Some satellites cover the entire United States. That's our current generation of satellites. Both us and DirecTV have under construction and they have launched a satellite that would be—do a spot beaming, where it would actually put a beam on a particular geographic location.

That allows us to do the local markets more efficiently. Those satellites aren't operational today, but both of our companies have invested to do that.

Mr. SCOTT. Do you do local television now?

Mr. ERGEN. We do do local television today, but we use a full CONUS beam. So when we broadcast to Washington, D.C., that signal actually goes to the entire United States, but we're prevented from—by the broadcasters from broadcasting that channel to anybody except those people in Washington. It's a very inefficient use of spectrum——

Mr. SCOTT. Is there any technological reason why you aren't serving some other rural area in Wyoming? What stops them from getting a dish and getting the service?

Mr. ERGEN. They can get a dish and a service. They just can't get the local service because they're not in the—they don't have the legal right per SHVIA act to get the Washington signal or one of the other signals.

Mr. SCOTT. So, actually, you cover the entire United States?

Mr. ERGEN. We cover the United States, but we're not allowed to broadcast a local signal except to those people in the local DMA. That's a part of the law, and then we have to carry all the signals in a local city with the Must Carry law. So there's—the bottom line is it's very burdensome that we duplicate channels. For example, we have 37—36 markets today or 36 markets. We show on January 1st 36 home shopping channels that are exactly the same. We broadcast one nationally, and we broadcast 36 to local markets with national beams, all using a terribly inefficient spectrum which raises cost to consumers and reduces their choices and makes us less competitive to cable. This merger can help alleviate some of those problems.

Mr. SCOTT. Let me ask it in another way. Is there anyone in the United States that can't get your service today?

Mr. ERGEN. No. There's no one in the—every square inch of the United States, including Alaska and Hawaii, we cover today.

Mr. SCOTT. If the merger goes through or if it doesn't go through—I want to follow up on a question from my colleague from Virginia. If it goes through or doesn't go through, what difference would that make to DSL and HDTV?

Mr. ERGEN. It will mean that HDTV will be slow moving. It will mean that we will have to require—that we'll have to rely on the broadcasters to roll it out nationwide. We know their signal will not reach everybody in the United States but——

Mr. SCOTT. What does the merger have to do with this?

Mr. ERGEN. The merger frees up spectrum, spectrum. But, right now, we duplicate spectrum. So we unduplicate that spectrum. We free up about 500 channels initially and more over time that allow us to do a dozen high-definition channels overnight. Overnight, with one flip of the switch when this merger happens, we can be broadcasting 12 channels of HDTV.

Mr. SCOTT. And aren't the 500 channels——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

Much of the discussion today on the proposed merger has been around how it would affect rural areas, and that's obviously appropriate, since rural consumers would be most directly affected by the proposed merger. I'd ask that any members of the panel that might like to do so would elaborate a little further on how the proposed merger would affect the urban areas within our country. And perhaps if we could start with you, Mr. Ergen.

Mr. ERGEN. I think it has a great positive effect on the urban areas. And, as you know, in urban areas the cable companies have clustered together now, and they may own—they may have 90 percent of the Pay TV subscribers in the cities. And they've clustered together, and they have continued to raise their rates at, you know, double and triple the rate of inflation. By combining our spectrum and becoming more efficient and getting better programming costs from programmers, we're able then to compete more effectively with those and bring cable prices down instead of—or at least lessen the rate of inflation and compete with new things such as broadband offerings and things like video on demand that cable operators are going to roll out. If we don't do that, we'll never effectively be competitive in the urban areas, and we'll be relegated only to those urban markets who don't have a cable company there.

Mr. CHABOT. Mr. Pitofsky?

Mr. PITOFSKY. Yes. Two points. In urban areas the risk is that consumers, who now have the benefit of fierce competition between two satellite companies will be down to one. They'll have no choice if they want to go the satellite route. I think it's instructive that cable prices have gone up—as Mr. Kimmelman has pointed out, have gone up and up and up, but cable is a monopoly in almost every part of the United States.

What we're doing now is we're talking about the possibility of satellite becoming a monopoly in many parts of the United States. That is on the risk side.

On the good side, I mean, I hear the argument that there are—the merger will lead to some benefits, local to local and so forth. The question is, can you not get there without the merger? The Department of Justice's expert witness in another proceeding testified in an affidavit form, I think, that you don't need the merger, that technology is there. Either one of these companies could achieve these. But I concede our benefits to consumers on their own.

I'm reminded in this conversation of Gary Gesell, a great antitrust judge, saying what we want in this country is for companies to use their brains and energy to expand their own business, not take out their checkbook and buy their competitor.

Mr. CHABOT. Thank you.

Mr. Phillips.

Mr. PHILLIPS. I'd like to add that I certainly agree with what the professor said. It's certainly better to have two robust competitors in urban America. That is not our forte.

But the point Mr. Ergen made that he's not using the satellites that are most efficient is very important. The DOJ witness pointed out how both DirecTV and EchoStar could expand their service offering today to include all of the local channels. They've chosen not to do that. They've come here suggesting that they don't have enough frequency, but they have hundreds of frequencies that they're not using today, and they're not using them with the most efficient satellite equipment. In rural America, which I'm speaking on behalf of, this has a tremendous impact of going from one provider to two.

And the other witnesses have—the questions have been answered about C-band. C-band is currently at 850,000. It loses 25,000 subscribers each month. We're in that marketplace. It's less than 1 percent of the market.

MMDS was mentioned, wireless, by Mr. Ergen. I was here 10 years ago with MMDS panelists talking about how they would be the great competition for cable. They have failed business plans. They're less than 1 percent of the market today.

Northpoint is an MMDS-like service. I don't suggest that it is going to be effective in rural America at all.

So while I don't know about urban America, I don't think the resources these two companies have are being fully utilized efficiently. Two is better than one in urban America, and certainly going to one in rural America is not acceptable.

Mr. CHABOT. Thank you.

Mr. Kimmelman.

Mr. KIMMELMAN. Yes. To put it in perspective, the broad market Mr. Pitofsky talks about includes 85 million households approximately that have cable and satellite available, and that's all urban areas and suburban areas, and this rural market is approximately 10 to 15 million households. It includes a large geographic expanse of 10 to 15 million. We do not support going to monopoly anywhere, but the problem here, as your former Chairman of this Committee, Mr. Hyde, said, was that we deregulated cable inappropriately when there wasn't competition and the rates were skyrocketing. So all the dangers Mr. Phillips talks about, all are related to the risks on consumers from premature deregulation.

What's the benefit in urban America from going from three to two? There's not a clear benefit. There's a danger, which is why we recommend licensing a new entrant before you approve this merger under antitrust, and that is before the FCC right now.

But what is clearly possible here is that with more capacity freed up, more cities, more suburban areas, we'll get the full panoply of local broadcast channels, as Congress has required under the Must Carry Law, and satellite will be able to offer everything that cable can offer and maybe even some comparable service to cable modem service in most communities in the country, possibly serving this 85 percent where there is overlap between cable and satellite. That would be an important improvement for price competition for consumers.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I appreciate the Chairman convening the hearing.

After hearing the testimony and the statements of—or questions of some of the members of the panel, it appears to me that I may be one of the few people who came in here without any perspective on this, which is not unusual for technology-related matters. And I'm not sure that, after I've heard the testimony, I have much of a perspective on it either. I've got friends on both sides, and as we went down the line it seems to me that I was influenced by each one of those sets of arguments, which is probably a good position to be in. So I hope you all won't line up at my door. We don't have any jurisdiction to change what the FTC and the antitrust division will do. So, hopefully, we won't have to take a vote on this.

I was struck by something that Mr. Kimmelman said about other potential satellite providers being licensed, and, Mr. Ergen, apparently you concede that there are only two satellite providers now, and this merger will result in only one satellite provider in the field. Is that right?

Mr. ERGEN. That is generally correct, although the NRTC and Mr. Phillips will still be a provider in those areas. So nothing changes. They still will have all the rights and obligations that they have from DirecTV to be the provider in those areas.

Mr. WATT. And the merger, one of the problems you indicated with the merger, or one of the benefits you indicated with the merger, was that you would eliminate the overlap—you would eliminate the duplication of spectrum use and allow consolidation. What would happen then to that other spectrum use? Would that still be owned by the consolidated merged companies, or would it go back and be available for sale or disposition by the FCC?

Mr. ERGEN. No. That spectrum would still be owned by the new company. It would be necessary to—and then it would be used to free up the spectrum for things like more local cities and high-definition interactive service and video on demand. So all the new services that we can't do——

Mr. WATT. But this merged company would still own—if it takes five bandwidths and five bandwidths now but two competitor companies, you'd still own all 10. Right?

Mr. ERGEN. Yes, just as a cable company that we compete against and has the dominant market share, just as they own all their spectrum, right, then we would own the spectrum to compete against that. So it's a little bit——

Mr. WATT. I don't know if you want to aspire to be like a cable company. I mean, that's one of the problems that I have. That's not a good argument with me, that you want to be like cable companies.

Mr. ERGEN. Well, not——

Mr. WATT. Let me ask Mr. Kimmelman whether there are some other potential good competitors out there that might be licensed. You mentioned a couple. And what would happen if this merger is not approved? Would those players still be in the mix, or is all the spectrum gone, or what would be the situation there?

Mr. KIMMELMAN. Those players could be licensed separate. They have nothing to do with the merger. The license applications, which are a secondary as the terrestrial use of satellite spectrum, not beaming up to a satellite, beaming up terrestrially, have been languishing at the FCC for years in fights with this very industry. The unique opportunity here, I would suggest in reviewing this merger, shines a light on the major opponent of licensing these new entrants being accused of bringing markets from three to two or two to one.

I would suggest that that's something the FCC and the antitrust officials could handle directly with EchoStar DirecTV. If they really want to have their merger consummated, they ought to get out of the way of new entrants in the market.

There is one who has been seeking a license——

Mr. WATT. Would part of that be to give up some of this spectrum that I've talked about or other——

Mr. KIMMELMAN. There are two ways to handle this. The secondary use doesn't require giving up any spectrum. It requires a secondary license with an assurance that there's no interference.

The second possibility would be a structural remedy Mr. Pitofsky applies in his testimony, which would be to free up some satellite capacity to ensure, particularly in rural areas, if that were necessary, that you are not going to solely one player. That would be appropriate for the antitrust officials to review as an alternative structural approach.

Mr. WATT. Let me ask you one other question quickly, because my time is about to run out. The extent to which EchoStar and DirecTV now compete with each other, what are the kinds of things you are competing with each other now about?

Mr. ERGEN. Well, in general, we compete because we have exactly the same programming up there, but, unfortunately, we don't compete against cable as well as we'd like to. We kind of fight against——

Mr. WATT. I'm talking about between the two of you. I'm not worried about cable at this point.

Mr. ERGEN. We generally have the same service, but we don't have all of the things we need to compete.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, gentlemen. Good to have you all with us.

Mr. Ergen, the pricing program has been discussed, but I am not firmly grasping it. I may not even be loosely grasping it. So let me try again.

Given that different cable companies offer different programming packages at different prices in different areas, what formula would you use to set a, "national price," that would be beneficial to all customers?

Mr. ERGEN. Okay. Maybe I didn't make it clear in my testimony, but we do national pricing today and have for the 6 years we've been in existence. And we have, for example, America's top 50 package, which starts at $21.99. That has about 50 of the most popular cable channels. It's the same price no matter where you live, whether it be North Carolina, whether it be Texas. DirecTV does exactly the same thing. They have a $21.99 package, essentially the same channels that they sell nationally. So we would commit that we would continue that.

We will have a cable company from time to time, particularly in a big city, that will come after that package and perhaps be very aggressive against it, which will force us to be aggressive. And then that new—that price would be the national price at that point in time. So it's a great thing for consumers, because they get the benefit of the most fiercely competitive area on a nationwide basis.

Mr. COBLE. Professor, would you like to weigh in on that?

Mr. PITOFSKY. Well, I'd ask, how are you going to handle introductory offers, special prices, weekend specials, free equipment and so forth? Would that be covered by your single national price?

Mr. ERGEN. I think I can only answer how we do it—the way we do it today. We have nationwide promotions. For example, we have an "I Like 9" promotion today, where you can get nine—pay $9.00 for a certain set of channels for a year, and we do that on a national basis.

Mr. COBLE. All right. Let me move along, then.

Mr. Ergen, let me ask you this question. How might this proposed merger affect your ability to adhere to the Must Carry obligations, A; and, B, will some markets lose local access? And, if so, where would these markets be?

Mr. ERGEN. I think it is imperative for us to comply with Must Carry, that this merger go through. It will greatly enhance our ability to comply with the Must Carry law. I believe that we would not lose access to any of the current 42 markets that our two companies do today if we're allowed to merge.

I think without the merger, it is possible, depending on how FCC rules, that some markets, at least from the DISH Network perspective, would have to be taken down.

Mr. COBLE. Now, Mr. Phillips, it has been alleged by some that you all would become a competitor if the merger comes through. I mean, I believe you said earlier—I think you refuted that, did you not?

Mr. PHILLIPS. Yes, Representative. NRTC has a distribution agreement. We own no satellite facilities. We have no ability to differentiate our product. We provide DirecTV today off of a subset of the frequencies that were mentioned here. Once EchoStar and DirecTV merge, we would simply be a distributor with a smaller subset of packages. EchoStar would be providing the whole of that in a very robust way, and I don't see any ability for us to compete on a facilities basis or otherwise.

Mr. COBLE. Now, you all are now a wholesale supplier of DirecTV, are you not?

Mr. PHILLIPS. Yes, sir. When we invested a hundred million dollars to help General Motors launch the DirecTV business, we were allowed to provide DirecTV service in about 7 million rural home areas. So part of rural America is served by DirecTV through our members and affiliates.

Mr. COBLE. And you own no satellites?

Mr. PHILLIPS. No, sir.

Mr. COBLE. Now, Mr. Kimmelman, I have omitted you. Do you want to weigh in to any of my questions?

Mr. KIMMELMAN. I was just going to respond to Mr. Phillips that he's in exactly the same position he was before the proposed merger, just dealing with a bigger adversary. I certainly have sympathy for him in doing that, and I think that would be appropriate for the Justice Department to look at.

Mr. PHILLIPS. I'm not in the same position today. I represent and present DirecTV's product in competition with Mr. Ergen. We compete with him in the market. We respect him as a competitor. After the merger, he's our sole supplier, and then we'll be provided a subset of what he has and be expected to compete against that.

Mr. COBLE. Thank you, gentlemen; and I direct the Chairman's attention to the fact that I beat the red light.

Chairman SENSENBRENNER. And we all appreciate that.

The gentlewoman from Wisconsin, Ms. Baldwin.

Ms. BALDWIN. Thank you, Mr. Chairman.

Let me begin by sharing that I have significant concerns about this merger, and it has been helpful for me to hear the discussion on how it might impact rural suburban and urban America. I represent a district that is roughly one-third urban, one-third suburban and one-third rural, and in a media market that is not one of the top 100 in Wisconsin. And so I have constituents who will have strong interest in this impact.

I have additional concerns about increasing concentration in many sectors of the economy. They may not have relevance to today's discussion, but it was only a few months ago that we had the Attorney General here before the Committee, and I expressed my concern about excessive concentration in the agriculture sector and how that is impacting my rural constituencies.

As we look at this merger, I am appreciative of the promises that EchoStar has made and specifically the commitment to rural services with a pricing system, a national pricing system that is fair. But even in my short time in Congress I have seen some of these promises not be sufficient to protect the public interest.

I guess, Mr. Pitofsky, based on your experience at the FTC, I'd like to have you elaborate on two things. One is the various types of nonprice competition issues that might arise if this merger were implemented, especially in the areas where there is no real cable alternative competitor.

And secondly—and you referenced this in response to the question that Mr. Coble raised—what—outside of a national pricing structure, what other types of pricing or fees or other pricing issues might come up for a rural consumer, aside from just the subscriber price? Are there going to be—you know, the equipment, the deals. Are there other ways that rural constituents of mine may feel the pinch?

Mr. PITOFSKY. Well, let me start with nonprice competition.

First of all, there's sort of a backdrop here of a suggestion that satellite can't compete with cable unless it gets bigger. I mean, satellite, with all due respect, has done a terrific job. You've gone from zero to 15, 17 million in a relatively short period of time. You're competing just fine, and it seems to me that you're competing primarily on nonprice, on service, on technology, on programming, on reliability, on new ways of doing things. And what I'm troubled about is, even if it is all true that there will be a national price, national terms of sale, which will be very difficult to monitor, even if that is all true, why do we need the merger? Why can't you people continue, as I think you've predicted you will and promise to do, to expand and expand and expand?

Let me add one more point. I've sat here quietly while people have spoken on the premise: What a good thing to eliminate duplication. Forgive me, but duplication is competition. I suppose if Kmart and Wal-Mart merged, they could eliminate duplication, but I don't think that is a very good idea. Efficiencies are other than eliminating duplication. And I come back to the proposition that these two companies have competed fiercely and admirably for many years, and they are doing well against cable.

I agree with Mr. Kimmelman. A large part of this problem emerges out of the fact that cable has such a dominant position in so many places in the United States. We ought to address that, but I don't think it is in the traditions of this country to address it by putting another monopoly in the field.

Now, as to fees, all I can say is, when you run a company, it is not just the price. It is all sorts of other things about service, reliability and so forth. And I just can't see how the Department of Justice, I guess it would be, is going to keep an eye on every single term of sale with respect to satellite in every community in the United States. It is the sort of thing the government tries not to do.

Ms. BALDWIN. Mr. Ergen, also in response to Mr. Coble's question, you mentioned in terms of pricing structure that, look at how you do it today as a basis for how you'd do it in the future past—proposed merger. I would appreciate it, and I think there should be considerable scrutiny prior to this merger, if you can share with the Committee data on your current pricing and extra fees and whatnot that occur so that we can look at that and extrapolate into what you might impose in the future.

Chairman SENSENBRENNER. The gentlewoman's time has expired. Without objection, the data submitted by Mr. Ergen will appear in the record.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, I have an opening statement to submit for the record.

Chairman SENSENBRENNER. That permission has already been granted.

Mr. GOODLATTE. Thank you, Mr. Chairman.

[The prepared statement of Mr. Goodlatte follows:]

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Thank you Mr. Chairman for holding this very important hearing on Direct Broadcast Satellite and competition in the Multichannel Video Distribution Market. Because this issue involves significant antitrust issues, I am pleased that the Judiciary Committee is taking action to review issues within its jurisdiction.

I continue to believe that government should tread lightly in the free market, and that full, fair, and open competition is the best way for the marketplace to flourish. However, as a member who represents a rural district in a state where almost 40% of homes do not have access to cable, I am interested in hearing how the proposed merger between EchoStar and DirecTV will affect rural areas.

As Co-Chairman of the Congressional Internet Caucus, I am also concerned about the roll-out of high speed Internet access to rural areas, whether cable or satellite-based. Competition in the marketplace is needed to bridge the digital divide between urban and rural consumers. Therefore, I am interested in determining the effect this proposed merger would have on the deployment of high speed Internet access.

In addition to these issues, I am anxious to examine how this merger will affect legislation I sponsored and worked to enact into law, along with my colleague Rick Boucher, last year. This legislation which authorizes the U.S. Department of Agriculture to provide loan guarantees to ventures utilizing satellite technology to deliver local television signals to satellite dish owners in the rural and smaller television markets the commercial satellite companies do not plan to serve. As the author of this local-into-local loan guarantee legislation which was signed into law, I am very interested in how this proposed merger will impact bringing local signals to all 210 television markets.

Again, I thank the Chairman for holding this important hearing and I look forward to hearing from our witnesses.

Mr. GOODLATTE. I want to thank you and the members of the panel for what has proven to be an excellent hearing and has, I think, fully talked about the issues related to this merger.

I have one that I don't think we have covered in as much detail as I would like, and that is the effect that this merger would have on legislation that passed through this Committee that Congressman Boucher and I worked on to provide local-into-local television service to all 210 markets in this country. That legislation has passed, signed into law by President Clinton. President Bush just last week signed the agriculture appropriations bill which provided funding to begin the initial process of that, $20 million, to the rural utility service to help fund that.

I very much welcome Mr. Ergen's comments that this merger would free up spectrum that would allow him to go from the 35 or 40 markets that he covers today to 100 markets. One of those 100 markets is a market that Congressman Boucher and I share, the Roanoke market. However, I have two other markets, Harrisburg and Charlottesville, that are about 180 and 192 in terms of their market size, and what I'd like to know is what this merger will do to the likelihood that the rural utility service will receive applications from people to put together a package when the market opportunities for that package will be greatly reduced to the smallest 110 markets and taking out some of those other markets that might make it more profitable. Mr. Ergen, would you care to comment on that?

Mr. ERGEN. Yes. Thank you very much. It's a good point.

I think that this merger greatly enhances the ability to get—while we as a company believe that we can only commit to the top hundred in the 50 States and maybe a few more, and not all of them, we think it enhances our ability to do that. And the reason is today both our companies have different technologies and different set-top boxes. So we're Beta/VHS. And if you're going to launch a satellite for the next—the top 200 markets or the next hundred markets, you've got to be on one standard, one—otherwise, you just economically can't do it, and the government is going to loan some money for no reason.

So we think—when we put our companies together, we also are going to put them on one standard, and we're going to do that at our cost, not a cost to the consumer. We're going to do that at our cost, and it's going to be a couple billion dollars over a period of 3 or 4 years to do that.

At the same time, you could be building another satellite to do the smaller markets, and people like Capital Broadcasting have proposed plans, both in the—and maybe even in the Ka-band frequency to do so. And then they would be able to go to all our customers with that plan, because we're all on the same standard.

There is no way that the $1.2 billion loan guarantee that the government has put in place—and I commend them for doing so—is ever going to pay for the cost of changing out the set-top boxes.

Mr. GOODLATTE. Let me ask Mr. Phillips if he would comment as well, because I know that his organization has been interested in putting together such a plan. Mr. Phillips.

Mr. PHILLIPS. Thank you, Congressman. I appreciate your support, the Members of the Committee and all of Congress to help make those funds available.

I would say to you that, if this merger is allowed to be approved, you're correct that the economics of providing those lower-tiered markets are reduced. And we need to secure a promise, I guess from Mr. Ergen, if that goes forward, because he'll be in a position to control whether or not anyone can bring those markets to the combined platform that he's building. I want to suggest, as a competitor to the industry, that it wasn't until Mr. Ergen launched the local-to-local signals that DirecTV responded in a competitive fashion and launched local into local. That competition, in my mind, is what is going to continue to create an incentive to provide more local-into-local channels, not a merger where there is one platform.

I would also suggest that the cost of changing out the equipment is a massive undertaking. It is much more, we believe, than $2 billion. And do we really believe that Mr. Ergen is going to finance that and that the consumers are not going to pay that bill?

Mr. GOODLATTE. So at the very least there should be some protections that this marketplace would be open. But taking out 60 or so of the intermediate-sized markets, what effect does that have on the attractiveness of putting together a package for the remaining 110 markets? And I'll ask both of you to respond quickly.

Mr. PHILLIPS. There's two points there. First of all, you need to have access to a video programming resource. I mean, you are not going to be able to do that as an independent provider. Mr. Ergen, with a merged company, is going to have all the programming, all of the CONUS slots, and that is the common platform. So your economics of doing it as another platform are destroyed.

Secondly, all of the business models we've looked at have relied on a sharing, if you will, of delivering all 210 markets to make the economics work, and I would urge you to take a look at the DOJ's expert testimony——

Mr. GOODLATTE. But let me interrupt, because——

Chairman SENSENBRENNER. The gentleman's time——

Mr. GOODLATTE. Could Mr. Ergen briefly respond to that as well? I want to give them an equal chance to that last question.

Chairman SENSENBRENNER. Briefly.

Mr. ERGEN. I don't know that you can respond briefly, but basically the economics just don't work unless you get a single standard platform out there so that anything that Mr. Phillips and his organization might do for local to small markets can be spread across a common platform.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. I thank the Chairman.

Mr. Ergen, if this merger goes through, you'll control the three orbital slots or positions with continuous coverage over the United States. Is that right?

Mr. ERGEN. That's correct.

Mr. BACHUS. Would you be willing to divest yourself of one of those satellite positions?

Mr. ERGEN. That would defeat the purpose of the merger. Because, by divesting, you then lose all of the efficiencies and the spectrum savings to go in and do the other markets. So it just wouldn't make—it would defeat the purpose of doing it.

Mr. BACHUS. Do you agree that a merger without doing that would create a—you'd have a monopoly? You'd have all three?

Mr. ERGEN. Well, again, we believe we compete against cable in the multivideo market but——

Mr. BACHUS. I understand.

Mr. ERGEN [continuing]. So it is kind of hard for me to sit here and be called a monopoly when we only have 17 percent of the market versus somebody who is a monopoly and has 80 percent——

Mr. BACHUS. Let me ask you, you have 100 percent of the direct-to-home market. Right? Or 90 percent—you'd have 90 percent with this merger?

Mr. ERGEN. We would have about 90 percent of the direct-to-home market.

Mr. BACHUS. Let me ask you this, and I'm following up on Mr. Goodlatte, what he said. You're saying that this merger will—is needed to free up frequencies which could be used to provide local broadcasting. Is that right?

Mr. ERGEN. Among other things. Not just local broadcasting but eventually high-speed Internet, broad bands——

Mr. BACHUS. Let's talk about local broadcasting. You're saying that this merger would help you with local to local. Right?

Mr. ERGEN. Right. I see no way of doing more markets.

Mr. BACHUS. Unless you get the merger.

Mr. ERGEN. Unless we can combine spectrum and efficiencies to do so.

Mr. BACHUS. Let me ask you about a study that was given to us. It was by Roger Rusch, an engineering consultant for the Department of Justice. He filed a written declaration in a satellite Must Carry case, concluding that the DBS system could be built using currently available technology that would enable satellite carriers to offer a rebroadcast of all high-powered television broadcast stations in the continental United States, pursuant to the Satellite Home Viewer Improvement Act, and such a system could be operated using only 12 DBS frequencies.

Mr. ERGEN. I'm very familiar with what report.

Mr. BACHUS. Do you agree or disagree?

Mr. ERGEN. I disagree with his analysis, and here is why. He provides in his report that we completely change out our technologies to something called A-PSK. Today we use a technology called Q-PSK. So he doesn't go into the economics—as a business guy, I have to look at this to my shareholders and whether I can raise capital to do a project like that.

Now, technically, I do agree with enough time and enough money that you can solve a lot of problems. I just don't believe that what he has come up with is a practical solution. It would be cheaper for us to go put fiber to every home and do it that way than it would be to build his new generation of satellites and replace all of our equipment in the field as he suggests.

Mr. BACHUS. Could you provide to this Committee the information you have which rebuts his argument?

Mr. ERGEN. I'd be pleased to do so.

Mr. BACHUS. Okay. Thank you.

[The information referred to follows:]

ECHOSTAR

ECHOSTAR COMMUNICATIONS CORPORATION

February 6, 2002

The Honorable James Sensenbrenner
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

In the December 4th hearing of the House Committee on the Judiciary regarding the proposed merger of EchoStar Communications and Hughes Electronics, Congressman Spencer Bachus requested information rebutting the Declaration of Robert J. Rusch. I have enclosed with this letter, the EchoStar-Hughes reply.

Thank you for the opportunity to testify, and I look forward to working with you in the future.

Sincerely,

Charles W. Ergen
Chairman and Chief Executive Officer
EchoStar Communications Corporation

cc: Congressman Spencer Bachus

1233 20TH Street N.W., Suite 701 • Washington, DC 20036 • Phone: (202) 293-0981 • Fax: (202) 293-0984

Spectrum and Satellite Efficiencies
From the EchoStar/Hughes Merger
Response to the "Rusch Declaration"

This memorandum addresses the Committee's request that EchoStar Communications Corporation and Hughes Electronics Corporation respond to the analysis set forth in the so called "Rusch Declaration."[1] Any analysis of the Rusch Declaration must begin with the simple fact: if the single orbital slot super-satellite envisioned by Mr. Rusch were practical, then EchoStar, Hughes Electronics, and the other DBS firms in the world would have every reason to build it, yet, whatever the *theoretical* technical merit of Mr. Rusch's satellite, no one anywhere in the world has ever deployed anything like it. Ultimately, his theoretical conclusion simply restates the truism that, with enough time and enough money, almost anything is possible on paper.

The more important question in terms of assessing the merger is whether the scenario described in the Rusch Declaration would be likely to occur in the real world if the merger is not approved. For many technical and economic reasons, the answer to this question is no, not in any time frame that is relevant to the pending merger.

Shortcomings of the Rusch Analysis

The Rusch Declaration suffers from two primary shortcomings: (1) it makes a number of incorrect, unwarranted, or unproven assumptions about the *technical* feasibility of the novel single orbital slot satellite it proposes, and (2) it disregards entirely the question whether

[1] The Rusch Declaration is an analysis written by an engineer named Roger J. Rusch for litigation purposes in a matter unrelated to the proposed merger between EchoStar and Hughes. The substantive conclusions of the Rusch Declaration have never been accepted by any court or regulatory agency.

such a system is *commercially* feasible and thus likely to be deployed in the foreseeable future under real-world conditions. As recognized in the Department of Justice merger guidelines, proper antitrust analysis is limited to alternatives that are "practical in the business situation faced by the merging firms" and should not rely on alternatives that are "merely theoretical" (Horizontal Merger Guidelines, § 4).

Technical Flaws:

- by focusing solely on the goal of maximizing carriage of local broadcast signals, Mr. Rusch theorized a single orbital slot all spot-beam satellite and disregards completely the different considerations involved in increasing capacity for new national programming, such as HDTV, pay-per-view, video-on-demand, interactive and educational channels;
- Mr. Rusch's proposed super-satellite would push beyond the mass and power limits of commercial satellite technology, exceeding the capabilities of any currently available, pre-designed satellite and therefore (unlike most commercial satellites) requiring an entirely new design;
- the Rusch design would require a super-size antenna and a significant advance in antenna design and deployment;
- the powerful on-board computing power necessary to process digital signals has never before been attempted with any DBS satellite;
- the proposed satellite would use a new (for DBS) modulation scheme (8PSK modulation) that is significantly more susceptible to interference, compounding the antenna design issues and requiring new set-top boxes for millions of customers seeking to receive local channel service; and
- the Rusch design poses significant risks of failures and poor service quality, particularly due to potential spot beam overlap and the fact that the spot-beams are not aimed at the communities that would want the local channels they would carry.

Lack of Commercial Viability:

- Mr. Rusch does not attempt to estimate the cost of the proposed single orbital slot super-satellite and its associated ground facilities, nor does he analyze at all whether a commercially viable service could be established in light of the projected costs;

- given its unproven technologies , it could well be prohibitively expensive – or even impossible – to insure the satellite, leaving the satellite carrier at risk for any catastrophic failure;
- in addition to the super-satellite itself, Mr. Rusch's scheme would require elaborate new ground facilities – including six new uplink facilities – at costs that could equal or exceed those of the satellite;
- implementation of the Rusch proposal would render existing investments in spot-beam satellites largely redundant;
- no system like Mr. Rusch's has been implemented anywhere in the world;
- Mr. Rusch's proposed system – even if determined to be feasible – would require between 34 and 44 months to build, launch, test and place in service;
- Rusch does not address – and his expensive system would compound – the economic difficulty posed by small subscriber bases in some DMAs and the high on-the-ground costs of carrying local channels, such as collecting the local broadcasts and transmitting them to a satellite uplink center; and
- even if implemented, Mr. Rusch's proposal would not eliminate the current wasteful duplication of spectrum use, thus denying substantial benefits to consumers.

The Benefits of the Proposed EchoStar-Hughes Merger for Expanded Channel Carriage

In contrast, the proposed merger will result in many efficiencies and cost savings. Specific spectrum-related benefits of the merger will include:

- the merger will end redundant broadcasts, creating hundreds of new channels of capacity useful for both national and local programming;
- the combined firm will be able to expand significantly —in an economically viable manner—the number of television markets which receive local programming;
- the merger will provide the unified firm with a more stable and better utilized satellite fleet; and
- the merger will lower the costs of providing DBS service, which will enable the merged firm to offer a better value to consumers and better compete with cable.

Mr. BACHUS. Let me ask you one final question. Since 1997, you've had an—EchoStar has had a license—FCC license to operate Ka-band satellites at two orbital positions, but you hadn't launched a single satellite. Is that correct?

Mr. ERGEN. I'm not sure exactly—I think you're referring to the Ka-band frequency, the 121——

Mr. BACHUS. Yeah, Ka-band service.

Mr. ERGEN. Yes. We have a satellite under construction, Mr. Congressman, that will launch about September or October of next year, so about 10 months from now. And we've been building—the satellite has been under construction for about three years.

Mr. BACHUS. Whether you have this merger or not, you'll still deploy this Ka-band service?

Mr. ERGEN. Yes, we will. The Ka-band frequency is one that we believe long term will have some benefit. Many people have talked about it in relation to local-to-local guarantee. We're going to experiment with that frequency. We know it's going to be technically challenging, but there is some hope there.

Mr. BACHUS. Well, that is my point. Wouldn't this Ka-band service—if you launched these satellites, couldn't you use that for local to local? Wouldn't that be one solution?

Mr. ERGEN. We could use it for local to local, and obviously new entrants into the marketplace could do it. Pegasus, who is a member of the NRTC and their largest distributor, has Ka-band licenses. They could launch those satellites today, but they use their capital and risk their capital just like our company has.

Mr. BACHUS. All right. But you could give this Committee assurances that you will launch those satellites whether or not this merger goes through or not?

Mr. ERGEN. Well, we'll launch it. I can't give you assurance that a rocket doesn't blow up, but I can guarantee you we're going to launch that first satellite at 121, because we've paid about 90 percent of the costs of doing so. So we will launch that one.

Mr. BACHUS. Thank you.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Trying to take my eyes off of this merger and look at a little bigger picture, perhaps a view from space, it appears as though this merger is all based on the assumption that a triopoly of the Bell system, the cable companies and the satellite companies will give us better competition, even though we're clearly reducing competition in the arena in which you operate. Is that a fair way of talking about how we're going to define the market in the future at most?

Mr. ERGEN. Well, I think you bring up a great point. Today we define the market as the pay TV market, and obviously we're only—we're a small fraction of that, but we're also in the broadband mat, the video-on-demand market, the telephone market.

And let's take broadband, for example. We have no economic ability to compete in that market today, and our competition, cable, is the dominant provider there today of high-speed access. So we're in a situation where people are asking us to fight against the entrenched cable company with one hand tied behind our back, and DirecTV has to fight with one hand tied behind their back. All we're asking is to say, we put these two together. We can get a fair fight. Let the marketplace decide, and I think the consumer will win.

Mr. ISSA. Following up on that general line—and others can chirp in if you have decidedly different opinions—if we in the government, not necessarily this Committee, but we in the government were to recognize hypothetically that three is not enough or that there are only two in some areas and only one in—for practical purposes, especially with broadband, you might be the only broadband supplier. If we were to specifically authorize new bandwidth, make new, you know, satellite competitors available as a matter of national priority or other fiber to the home, as you suggested and so on, how does that affect the viability of the model that you're saying is going to pay for putting together some fairly debt-heavy companies?

Mr. ERGEN. Well, we're putting our money where our mouth is and saying we believe we can be the most efficient. We recognize that competition is going to come. It's coming from the Internet through video today. I can receive my local channels from many different cities on the Internet today, for example.

We know that fiber to the home is a reality, and it's starting—it's going to be a long-term competitor. We have to become efficient. We have to be able to merge to get stronger. And we have to be good at management. Otherwise, the marketplace will—as they have done to so many companies in high-tech, you're only as good as your last quarter. You're only as good as what you did yesterday. We have to continue to move at light speed to compete, and that's why this merger is necessary.

Mr. ISSA. But following up on that, if we gave you more spectrum and/or sold you more spectrum and your competitor so that we would have two satellite providers, does that in fact make your model not work, even if we had the spectrum available for you today?

Mr. ERGEN. Well, the spectrum is the biggest thing, but realize that we also each launch a new satellite every year for $250 million. We each get higher—we each had to pay higher programming costs by 5 to 15 percent over the large cable companies. We each have much, much—we have a lot of other efficiencies that obviously go along with this merger besides spectrum.

But spectrum is the main one, and if spectrum were freed up, it certainly would be something to look at.

Mr. ISSA. Okay. And for everyone else on the panel, I would appreciate—since we know that monopolies are inherently efficient in their buying, if you could comment on maybe the other side of that, I would appreciate it.

Mr. PHILLIPS. I would like to offer that both of these competitors, EchoStar and DirecTV, both are very successful. They're both financially doing very well in the marketplace. I've included charts in my testimony to show that the amount of spectrum resource they have in the Ka-band is 50 percent of what's already been allocated. So by using more efficient technology—and they're going to do that because they're competing, by the way—I think that they can get these things done, and it will be more effective, both for cable and certainly in rural markets.

When Mr. Ergen suggested that Pegasus or anyone else could put their money up and launch these other services, when you're a consumer at that home, you don't want to have multiple dishes at your home and multiple set-top boxes. There's a synergy here to pick one or the other, DirecTV or EchoStar. Today they can pick StarBand, or they can pick DiRECWAY as Ku-band Internet access products. If there's a third one that doesn't have any video connected with it, it's going to be nearly impossible to break into that market. So this is really going to forestall anybody.

In having been involved in this market the last few months, we've seen companies like AstroLink and Wild Blue just fall apart once this merger was announced.

Chairman SENSENBRENNER. The gentleman's time has expired.

Go ahead, Mr. Kimmelman.

Mr. KIMMELMAN. I'll be very brief. We wish we had more phone companies. They've been consolidated. We wish we had more cable companies. They've been consolidated. Now we see the satellite companies attempting to consolidate. My suggestion is we look aggressively for new spectrum, new entrants. But deregulation has led to a lot of this consolidation, and with no price limits right now for the dominant player in the multichannel market cable, it's consumers who are bearing the risk of day-to-day, month-to-month, year-to-year price increases. So I urge you, besides tough antitrust enforcement we need aggressive, procompetitive policy to get more players in the market.

Mr. PITOFSKY. Mr. Chairman, could I similarly, very briefly, very briefly?

Chairman SENSENBRENNER. Very briefly.

Mr. PITOFSKY. I encourage thinking outside the box, which is what you've suggested here. We know this merger as proposed has its problems. On the other hand, we know the market isn't working all that well. There ought to be other ways to get at this, and I certainly encourage that kind of—addressing the problem.

Mr. ISSA. Thank you.

Chairman SENSENBRENNER. That concludes the number of—the Chair recognizes the Ranking Member briefly.

Mr. CONYERS. Just an observation. It's a busy day for half our witnesses. They've got to go to another hearing on the same subject, chaired by Chairman Billy Tauzin. And Mr. Phillips will be there. Mr. Ergen will be there. But Professor Pitofsky won't be there. That is—might be—and this is a question, because the president of Pegasus will be there, and he's represented by—guess who—Arnold & Porter, right?

Mr. PITOFSKY. Oh, absolutely.

Mr. CONYERS. Yeah. So you couldn't come in here opposing a firm that you're—a client that your firm is representing. Could you or couldn't you?

Mr. PITOFSKY. Mr. Conyers, yes, I could.

Mr. CONYERS. You could?

Mr. PITOFSKY. Yes.

Mr. CONYERS. Will you be the first—will you give me an example of another—of counsel that has represented somebody that his firm was representing? Do you have some examples?

Mr. PITOFSKY. When I was first invited here, I disclosed immediately——

Mr. CONYERS. I just asked you if you had some examples.

Mr. PITOFSKY. Oh, I don't have any examples of——

Mr. CONYERS. Well, when you get some, send them to me.

Mr. PITOFSKY. Okay.

Chairman SENSENBRENNER. Well, I think this is a good chance to close this hearing and to allow all of the witnesses to lick their wounds, whether they are coming back around the corner, whether they are not.

Let me say that Mr. Pitofsky was a witness that was invited by the majority of this Committee; and, given the position that you held in the Clinton Administration, it shows how bipartisan and open-minded at least this side of the room is. We appreciate your coming, and we'd like to invite you back sometime in the future.

Chairman SENSENBRENNER. With that happy note, the hearing is adjourned.

[Whereupon, at 11:51 a.m., the Committee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR HEARING RECORD

National Association of
NAB
BROADCASTERS

THE PROPOSED MERGER OF ECHOSTAR COMMUNICATIONS CORPORATION AND HUGHES ELECTRONICS CORPORATION WILL DIRECTLY HARM BROADCASTERS AND CONSUMERS.

The proposed transaction between EchoStar and Hughes Electronics to combine DirecTV and the DISH Network will create a monopoly in Direct Broadcast Satellite (DBS) service and reduce the number of multichannel video programming distributors in most markets in the U.S. from three to two. As with most claims of the "benefits" of monopoly/duopoly, consumers lose when there is less, not more, competition.

- DirecTV and EchoStar have competed head-to-head in pricing, innovation, service, and equipment, benefitting both consumers and broadcasters.
- The growth of local-to-local market satellite service has grown, not lessened, with competition. It is in the interest of broadcasters to expand the availability of local-to-local service and that can best be served by competition, not monopoly.
- There are no technical limitations on the ability of the two carriers to expand local to local service. The two carriers today currently control all of the DBS high power CONUS spectrum and with the advent of new technology and innovation each carrier has the ability to provide local to local service in all markets individually.
- The merger will lessen competition with cable, not increase it. The Antitrust Division and the Federal Trade Commission have consistently rejected the notion that the reduction of competitors from three to two increases competition, and have rejected the very types of excuses that EchoStar and DirecTV are offering here.

1. EchoStar and DirecTV Control The DBS Spectrum

In 1997, there were five DBS licensees with high powered DBS Ku-band satellite capacity within the coveted full CONUS orbital arc that covers the entire continental U.S. Today, only DirecTV and EchoStar remain after consolidation. As a result, EchoStar and DirecTV are licensees of all high powered DBS Ku-band spectrum and no full CONUS DBS spectrum is available for any potential third party local-to-local provider. In addition, DirecTV's parent (Hughes) and EchoStar have also gained control of many of the new Ka-band licenses first issued by the FCC in 1997: the two firms are licensees of five full CONUS Ka-band slots as well as eight non-CONUS Ka-band slots.

2. EchoStar and DirecTV have Competed Directly Against Each Other in the Satellite Distribution Market

As EchoStar itself has admitted, DBS constitutes a separate market and by any indicia these two compete head-to-head within that market. Despite its present self-serving claims, EchoStar as recently as April 2001, in a lawsuit it filed against DirecTV, specifically acknowledged that the relevant antitrust market is the "High-Power DBS Market." Amended Complaint, ¶ 76, at 24, *EchoStar Comm. Corp. v. DirecTV Ent. Corp.*, Civ. No. 00-K-212 (D. Colo filed Apr. 5, 2001). In the same lawsuit, EchoStar admitted that "satellite to home broadcast services constitute a stand alone market, distinctly separate from the cable business." *Id.* (original Complaint filed Feb. 2000). A direct result of the head-to-head competition between the two firms in the DBS market has been lower prices and better products and service for consumers, including the invention and rapid growth of local-to-local broadcast service.

- **Price and Service Competition**

The two carriers have bitterly competed against each other to offer attractive programming, pricing and service. For example, DirecTV has taken the lead in offering exclusive, high-end sports and movie programming (such as NFL Sunday Ticket and recent pay-per-view movies), forcing EchoStar to respond with aggressive competition in price and other service offerings.

When EchoStar entered the market in 1996 it slashed, by hundreds of dollars, the price of buying a satellite dish and receiver – launching the $199 dish/receiver combo. DirecTV was then forced to match the new entrant's aggressive pricing plan. Since then, the industry has moved to still lower upfront costs, thereby providing a strong boost to industry growth.

The two firms have also vigorously competed with one another on monthly service fees. For example, EchoStar introduced its lease plan in late 2000 and early 2001, allowing consumers to avoid the upfront investment in equipment. DirecTV was soon forced to follow suit.

- **Local-to-Local Coverage Competition**

Both firms have directly competed against each other since the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") to embrace local station service. Each firm today offers local channels in 36 to 41 markets and has matched the other's offerings in virtually all cases. (See attached table.) Each firm knows that if the other firm offers local-to-local in a particular market, the other firm will be greatly disadvantaged until it matches that offering. As a result of the addition of local channels, both DirecTV and EchoStar have experienced phenomenal growth since the enactment of the SHVIA: DirecTV grew 31% to 10.3 million subscribers, while EchoStar has doubled its subscribers to 6.41 million. Had there been only a single DBS firm, this innovation would have been significantly delayed and would not have occurred at all in many markets.

- **Technological Competition**

Since there are many ways of increasing the amount of television programming that DBS firms can deliver to viewers, each of the two firms have constantly sought to develop new technical means to increase its effective capacity. The technical areas in which the two have competed – and would continue to compete absent a merger – include:

- Development of "spot-beam" satellites that reuse "national" spectrum multiple times to deliver local stations in different areas
- Development of home satellite dishes that can receive signals from multiple different satellite locations
- Digital compression techniques and statistical multiplexing to squeeze more programming onto a single frequency
- Use of alternative satellite slots

- Development of the Ka-band to greatly expand the already abundant capacity controlled by EchoStar and DirecTV in the Ku-band

The two firms have similarly vigorously competed against one another in offering the consumer advanced equipment that cable simple does not offer at all. These innovations include personal video recorders that record to a digital drive instead of to videotape; capability to view high definition programming; and interactive television features.

3. The Merger Will Lessen Competition Against Cable, Not Increase It

Both cable and satellite service act as "gatekeepers" to the provision of multi-channel video programming, particularly local news and programming, to consumers. Over 70% of TV households are now tied to cable, while more than 12% are served by satellite carriers. In virtually all cases, television sets hooked up to cable or satellite today are not equipped to receive off the air broadcast service. Thus, the cable or satellite provider is able to exercise "gatekeeper" control over the signals viewed on a connected television set. Because most cable systems have local monopoly franchises, the only competition to this "gatekeeper" role is provided by satellite distribution service provided by EchoStar and DirecTV. Thus, not only do the two satellite systems directly compete against each other, they also compete against cable. There is simply no good antitrust reason why reducing the number of gatekeepers from three to two can serve consumers or broadcasters; the antitrust authorities have consistently rejected such claims in industry after industry, and no court has approved a merger to duopoly under these circumstances. *See FTC v. H. J. Heinz*, 246 F.3d 708 (D. C. Cir. 2001) (rejecting arguments that merger to duopoly would allow the # 2 and #3 firms to compete better against the # 1 firm).

4. The Merger Is Not Necessary To Allow the Growth of Local-to-Local Market Service

Prior to the merger announcement, both DirecTV and EchoStar had already stated plans to expand their local to local coverage to 60 markets, using spot beam satellites. Given the past track record, NAB believes that competition between DirecTV and EchoStar, combined with each provider's enormous satellite capacity and continuing rapid technical innovations, will drive both to offer many more local markets either by utilizing their existing Ku-band and Ka-band capacity or by partnering with a third party to deliver markets 60 and above. That conclusion is buttressed by an expert report recently filed on behalf of the U. S. Department of Justice in federal court in Alexandria. As that report demonstrates, DirecTV and EchoStar today have more than enough Ku-band satellite capacity to offer all markets via satellite, without even touching their Ka-band capacity. A lack of capacity for local to local is essentially a myth.

5. The EchoStar/DirecTV Monopoly Could Be a Fatal Blow to Local Coverage in Rural America

If EchoStar and DirecTV are allowed to merge, consumers in 110 U.S. television markets will likely never receive local news, sports and weather via satellite. EchoStar has already publicly stated that the combined company would offer local signals in only 100 markets – virtually all in the top 100. (There is no guarantee that the combined entity would serve even that very small number of markets; the "100" figure is simply an unenforceable prediction at this point.) Given the high barriers to entry, particularly the 100% dominance of Ku-band spectrum by EchoStar and DirecTV, there is no viable economic platform that could support a competitive third-party provided for rural markets. Only competition will drive those systems to provide local coverage in rural America.

6. Promises of "Benefits" Cannot Replace Competition And Are Belied By the Track Record of the Satellite Carriers

EchoStar and DirecTV have a demonstrated record of failing to comply with both Congressional and agency requirements to deliver over-the-air TV stations in accordance with the law. There is simply no good reason to believe their "promises" now.

-- the DBS firms have illegally exploited the narrowly-limited distant signal compulsory license to deliver distant ABC, CBS, Fox, and NBC stations to millions of ineligible viewers, stopping only to the extent ordered by courts to do so;

-- EchoStar and DirecTV have broken faith with Congress by accepting the lucrative benefits of the SHVIA local station compulsory license and then running to court to try to have the Act's "carry one, carry all" provisions declared unconstitutional;

-- The DBS firms (particularly EchoStar) have played unconscionable games to try to block local stations from exercising their right to carriage under the "carry one, carry all" provisions;

-- The FCC has found the EchoStar "failed in its duty of candor to the Commission" and "abused the Commission's processes" in its prosecution of a complaint against a broadcaster for failing to grant retransmission consent to EchoStar.

7. Conclusion

The proposed merger of EchoStar and DirecTV is based on the simple premise that monopoly/duopoly is good, and competition is bad. That premise, however, is not the law and has consistently been rejected by Congress, the courts, and the antitrust agencies.

Appendix A
Local Markets
on DBS

Market	DirecTV	EchoStar
Albuquerque		✓
Atlanta	✓	✓
Austin	✓	✓
Baltimore	✓	
Birmingham	✓	✓
Boston	✓	✓
Charlotte	✓	✓
Chicago	✓	✓
Cincinnati	✓	✓
Cleveland	✓	✓
Columbus, OH	✓	
Dallas/Ft. Worth	✓	✓
Denver	✓	✓
Detroit	✓	✓
Greensboro	✓	
Greenville/Spartanburg	✓	✓
Houston	✓	✓
Indianapolis	✓	✓
Kansas City	✓	✓
Los Angeles	✓	✓
Memphis	✓	
Miami	✓	✓
Milwaukee	✓	
Minneapolis/St. Paul	✓	✓
Nashville	✓	✓
New York	✓	✓
Orlando	✓	✓
Philadelphia	✓	✓
Phoenix	✓	✓
Pittsburgh	✓	✓
Portland, OR	✓	✓
Raleigh/Durham	✓	✓
Sacramento	✓	✓
St. Louis	✓	✓
Salt Lake City	✓	✓
San Antonio	✓	✓
San Diego	✓	✓
San Francisco	✓	✓
Seattle	✓	✓
Tampa/St. Petersburg	✓	✓
Washington, DC	✓	✓
West Palm Beach	✓	

Source: DirecTV and EchoStar Consumer Websites

Material Submitted for the Hearing Record

ECHOSTAR

ECHOSTAR COMMUNICATIONS CORPORATION

January 7, 2002

The Honorable James Sensenbrenner
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner:

I appreciated the recent opportunity to testify before the House Judiciary Committee regarding the proposed merger of EchoStar Communications and Hughes Electronics. I noted your comments and those of your colleagues on the importance of this merger to the Multi-Channel Video Distribution ("MVPD") market and I feel very strongly that combining our duplicative program distribution platforms is key to providing American consumers a viable alternative to cable. I look forward to working with you and your colleagues as the process proceeds.

In the December 4 hearing, you suggested that there was a possible inconsistency between my hearing testimony and the complaint that EchoStar filed against DIRECTV in the Federal Court for the District of Colorado relating to certain practices of DIRECTV. This complaint was originally filed on February 1, 2000. An amended complaint was submitted on December 8, 2000, although, due to opposition by DIRECTV, the court did not accept it as filed until April 5, 2001. In any event, I do not believe there are any inconsistencies in my comments. In order to fully address your question, I'd like to expand upon the answer I provided to you at the hearing and review developments in the satellite market that took place in the time period between January 2000, when our complaint was originally filed, and the December 4, 2001 hearing.

When high-power direct broadcast satellite (DBS) technology was introduced in 1994, it quickly became a popular choice over other existing satellite services. First, the high-power signal allowed customers to use a much smaller, pizza size dish, a much preferred choice over the larger dishes used by C-band and medium-power DBS customers (those dishes were often four to eight feet in diameter). A second advantage high-power DBS technology held over other existing satellite technologies was its superior digital signal and the availability of more channels. Because we operated in a higher frequency range (the Ku-band) than C-band and medium-power DBS, we were able to provide, at a lower price, more channels and a better signal with a smaller dish.

Recent innovations, including increases in C-Band's digital capabilities, however, have made C-band a more competitive option. For example, on April 12, 2001, Motorola announced a major marketing campaign around its new 4DTV product, which offers digital reception and premium

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programming like the NFL Sunday Ticket.[1] According to Motorola, C-Band customers with 4DTV can now receive 439 channels for $60 per month, and 4DTV is marketed as a direct competitor to Dish Network and DIRECTV.[2]

It is true that C-Band's large dish size makes C-Band less attractive in densely populated urban and suburban areas. Nevertheless, C-Band remains strong in rural America where dish size is less of an issue. The latest figures show that there are currently 919,782 C-Band subscribers, mostly in rural areas.[3] These customers have a number of providers to choose from, including HBO Direct, SuperStar, Netlink, Turner Vision, BigDish, NHE Programming, American Satellite Technology, Satellite 2000, Skyvision, Orbit Communications, Lone Star Satellite Communications and Satellite Programming Service.

As I mentioned in my prepared testimony for your Committee's December 4 hearing, new technologies have also provided competition, including SMATV, which offers "private cable" to apartment buildings and single-family residential developments, often using signals provided via C-Band satellites, and Multipoint Multichannel Distribution Service ("MMDS") or "wireless cable." We at EchoStar anticipate other developments in the satellite world in the near future – developments that will continue the evolution of satellite technology and provide healthy competition.

Once again, thank you for inviting me to appear before your Committee. We look forward to working with you in the future, and I would be happy to discuss further this or any other issue related to the merger.

Sincerely,

Charles W. Ergen
Chairman and Chief Executive Officer
EchoStar Communications Corporation

[1] Motorola Press Release, "Motorola's 4DTV Digital Sidecar Provides System Upgrade for C-Band Subscribers," April 12, 2001 (available at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=mot&script=411&layout=-6&item_id=166122).
[2] For example, charts on Motorola's 4DTV Internet site compare 4DTV with "Small Dish." (http://www.4dtv.com/4DTV/what_4dtv.html)
[3] Sky Research, November 2001, Volume 8, Number 11

American Cable Association

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December 4, 2001

The Honorable F. James Sensenbrenner, Jr., Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

RE: The Proposed EchoStar-DirecTV Merger and Competition in the Direct Broadcast Satellite and Multichannel Video Distribution Markets

Dear Chairman Sensenbrenner:

Thank you for the opportunity to provide these comments to you and the Committee members.

What is the American Cable Association?

The American Cable Association represents more than 900 independent cable businesses serving more than 7.5 million customers primarily in smaller markets and rural areas across the United States. In fact, American Cable Association members serve customers in every state and U.S. territory and also in nearly every congressional district represented by the members of your committee.

Unlike some larger companies you hear about, ACA members are not affiliated with programming suppliers, big satellite, cable and telephone companies, major ISPs or other media conglomerates. We focus on smaller market cable and communications services, often in markets that the bigger companies choose not to serve. Because our members live and work in these rural communities, they know how important it is to have advanced telecommunications services available to their businesses and customers.

ACA members companies are *not* the "giant entrenched cable monopoly" that others talk about so frequently. ACA members are simply small businesses in cable that happen to serve customers in rural America. Quite frankly, these small companies are the competitor to what may soon become the "giant entrenched *satellite* monopoly."

ACA members specialize in serving customers in smaller markets and more rural areas, and these companies are on the forefront of providing advanced telecommunications services to customers in these markets – oftentimes referred to as those areas across the "digital divide." Many ACA members now provide digital cable services and high-speed cable modem Internet services to the majority of their customers.

Introduction

Competition really means customer choice. No choice, no competition. However, the irony is that the status of competition and customer choice today, especially in rural areas and small towns, is already significantly limited because it is governed by an unlikely cast of players that do not live in rural America. And it will get worse as EchoStar and DirecTV together find anti-competitive means to extract monopolistic earnings from all Americans.

Unless there is significant congressional and regulatory review of these issues, the situation is not likely to improve. Consumer choice and competition may be wiped out in the wake of this mighty merged communication giants, among others.

There are three very important issues that threaten consumer choice in smaller markets and rural America and that will derail the progress to provide advanced services in smaller markets:

- First, the vastly increasing control of content, pricing, terms, conditions and placement requirements by just a few programming behemoths that truly control what the consumer sees.
- Second, the adverse effect in the smaller, rural marketplace of the proposed EchoStar-DirecTV merger, which will limit current competition in these markets from three current providers (EchoStar, DirecTV, and independent cable) to just one – the merged EchoTV monopoly.

- Third, the disproportionate burden of regulation on smaller, independent cable companies, like mine in rural America, compared to the free regulatory ride enjoyed by the satellite monopoly.

However, in these comments, we want to focus on the concerns created by the proposed EchoStar-DirecTV merger.

The EchoStar-DirecTV Merger

The primary concern created by this merger is:

Customers, particularly in smaller towns and rural areas, will face less choice as a result of the satellite monopoly that would be created from an EchoStar-DirecTV merger.

The merger will create a monopoly in the direct broadcast satellite business.

Despite the claims of Mr. Charlie Ergen, president of EchoStar, the relevant issue is not the state of competition between direct broadcast satellite (dbs) and cable. Mr. Ergen would have all believe that his monopolization of the dbs business is not important in his ongoing battle to compete against the "giant, entrenched cable monopoly." This argument simply flies in the face of the facts and many historical precedents, which show that monopolies behave like monopolies to the detriment of consumers.

The merger of EchoStar and DirecTV will create the world's largest multi-video programming distributor with nearly 17 million subscribers and give the merged companies nearly 90% of the full power, full-CONUS satellite transponders that exist. In addition, because of its size, the new entity would be able to extract terms and conditions in the marketplace that will allow it to undercut and eliminate its competition before raising prices to consumers as all monopolies do.

This is great power that will be concentrated in one huge company, which will in fact be the "giant, entrenched *satellite* monopoly."

This threat is particularly acute in smaller markets and rural areas where smaller, independent cable business form the last line of competitive defense to this new satellite monopoly.

As a result of its power in the marketplace and its limited regulatory burden – two factors that do not apply to small cable – the new EchoStar monopoly will be able to take advantage of a weakened marketplace and a weakened competitor. The end result will not be good for consumers who will have *no choice* for video or other advanced communications services.

The new merged satellite monopoly will be able to control programming and pricing to the exclusion of competitors, particularly in smaller markets and rural areas.

EchoStar claims the new merged satellite monopoly will be able to save about $700 million a year in its costs to obtain programming that customers now watch on dbs and cable. On the surface this may sound like a good thing, because one might think this would mean lower prices for consumers. But if this occurs it would only be temporary, as it always is with monopolies.

The merger itself will reduce competition in the smaller markets from three providers (EchoStar, DirecTV and independent cable) to two, and because of the power the new satellite monopoly will have over programming, it will likely limit the number of providers to just one – the EchoStar monopoly.

This will immediately effect rural customers who right now don't have access to cable and to those customers whose only competitive choice is independent cable.

Small, independent cable businesses don't enjoy the advantages and the leverage that will come with the new EchoStar monopoly. And this lack of competitive balance in the marketplace will ultimately give the satellite monopoly the opportunity to eliminate its competition and take away any choice a consumer might have for video, digital and high-speed Internet service.

In a related proceeding, EchoStar argues at the Federal Communications Commission that the program access "exclusivity" rules, which prohibit exclusive programming contractions, should sunset in October 2002. No wonder. If these rules do sunset, the new EchoStar monopoly would have the ability to control access to programming and limit customer choice.

DirecTV currently has exclusive contracts for certain sporting events, meaning that Americans can only purchase this programming by buying it from DirecTV. Imagine what will happen after the possible sunset of the program access rules if the new satellite monopoly used its huge leverage to buy hundreds of sporting events and other programming on an exclusive basis. Millions of consumers would be forced to pay higher rates to get the same programming they used to receive from competitive providers like independent cable.

Each one of the foregoing issues directly and adversely affect the state of competition in the smaller, rural marketplaces and the ability of consumers to have competitive choices because (1) independent cable will no longer be a viable competitor the giant satellite monopoly, and (2) independent cable will no longer be able to provide advanced new services in the marketplace.

Right now, independent, smaller cable is the *only* viable competitor to the satellite monopoly, because other bigger providers don't want to go there! These rural areas are just too small for them. But if there is no viable competitor to the new giant entrenched satellite monopoly, then there is no chance for consumers in rural America to receive video service, advanced digital services or high-speed cable service as so many of ACA companies are providing right now.

The irony of this monopolistic situation is that, if it is not addressed, it will do exactly the *opposite* of what Congress wants – ensure competition and choice for consumers in the smaller and rural marketplaces from multiple providers of video services, digital, high-speed data and more. Instead, these markets will be left with just one provider – the new satellite monopoly.

EchoStar vs. EchoStar

In February 2000, EchoStar filed an antitrust complaint against Hughes/DirecTV. There are many noteworthy statements and allegations made by EchoStar and Mr. Ergen in the pleadings and briefs. Conveniently, this lawsuit is in the final stages of being dismissed. The Committee should review these statements carefully and, in the context of Mr. Ergen's announced merger with DirecTV, ask two simple questions:

Will the real Mr. Ergen – the competitor or the monopolist – please stand up?

and

Which Mr. Ergen should we believe?

What EchoStar says about DBS competition:

- DirecTV has engaged in "ongoing illegal attempts to monopolize [DBS] and damage [EchoStar's] business . . ."[1]
- DirecTV has impeded competition from EchoStar. "In the end, consumers are the ones to suffer."[2] (Put another way, consumers are the ones to benefit from DBS competition.)
- As a result of market dominance, "DirecTV can charge consumers exorbitant equipment and monthly service fees."[3]
- "[a DBS] monopoly and makes further competitive abuses easier and more likely.[4]

[1] Complaint, p. 2.
[2] Complaint, p. 3.
[3] Complaint, p. 24.

- "DirecTV's activities have caused a lessening of competition." [5]
- If DirecTV gains control all outlets of DBS service, "[it] would then be free to control prices." [6]

What EchoStar says about consumers:

- Eliminating choice for high power DBS service harms consumers.[7]
- "Customers in the High-Power DBS Market do not consider [cable services] to be effective substitutes for high-power DBS[8] equipment and high-power DBS subscription TV programming service."[9]

What EchoStar says about competition with cable:

- Cable does not offer an alternative to High Power DBS.[10]
- EchoStar intends to prove that EchoStar and DirecTV are the only two competitors in the DBS market and that competition for other sources [including cable], if any, is both qualitatively and quantitatively insignificant.[11]
- "EchoStar obviously does not compete with cable for retail customers. Similarly, because cable is only sold to homes "passed" with cable lines, EchoStar does not compete for "non-passed" customers."[12]
- EchoStar intends to prove that DBS is a separate product market from alternative sources of programming, including cable television.[13]
- "Cable television is an imperfect and comparatively weak substitute for DBS."[14].
- "EchoStar is DirecTV's closest competitor; DTV and EchoStar react primarily to each other when setting equipment and service prices.[15]

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[4] Complaint, p. 24.
[5] Complaint, p. 32.
[6] Complaint, p. 32.
[7] Complaint, p. 24.
[8] EchoStar Amended Complaint (dated Dec. 8, 2000), p. 25.
[9] Amended Complaint, p. 25.
[10] Complaint, p. 32.
[11] EchoStar's Response to DirecTV's and Hughes' Motion to Determine the Sufficiency of EchoStar's Response to Request for Admission No. 2 (dated Nov. 13, 2000), p.3.
[12] EchoStar Response, p.4.
[13] EchoStar Response, p.6.
[14] EchoStar Response, p.6.

- Arguing that the bare fact that many DBS subscribers once subscribed to cable . . . proves that DBS and cable are in the same relevant market is akin to asserting that horses, trains, and airplanes are in the same relevant market. . .[16]

- Determining whether DBS and cable are in the same market for antitrust purposes requires a fact-intensive analysis.[17]

We couldn't agree with Mr. Ergen more. He makes an excellent case about why the EchoStar-DirecTV merger is no good for consumers, no good for competition and no good for smaller markets and rural America.

The American Cable Association is pleased to assist the Committee in any way. With best regards, I remain

Yours most respectfully,

Matthew M. Polka
President

MMP/

[15] EchoStar Response, p.6.
[16] EchoStar Response, p.8.
[17] EchoStar Response, p.8.

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December 4, 2001

VIA ELECTRONIC MAIL

Honorable F. James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: Hearing on Multi-Channel Video Competition
December 4, 2001

Dear Chairman Sensenbrenner:

We are writing to request that this letter be included in the record at the hearing scheduled for December 4, 2001, on the state of Multi-Channel Video Competition. We also urge the Committee to request that EchoStar and DirecTV, which have proposed to merge their direct-to-home satellite operations, provide information that will cast light on the extent of the threat a merger would pose to the survival of free over-the-air broadcast services that have been the bedrock of American broadcasting since the advent of television over 50 years ago, if a single monopoly entity controls the satellite distribution of television broadcast signals to the public.

When it enacted Section 338 of the Communications Act, Congress intended satellite carriers, including EchoStar and DirecTV, to carry all local television stations in any market where local-into-local service is provided in return for the significant privilege of having a blanket copyright license available. Congress recognized that "without must carry obligations, satellite carriers would simply choose to carry only certain stations, which would effectively prevent many other local broadcasters from reaching potential viewers in their service areas." 145 Cong. Rec. H11769-01, at H11795 (Daily Ed. Nov. 9, 1999).

The performance record of EchoStar and DirecTV makes it clear that they have no interest in fulfilling the intent of Congress. Rather, they are vigorously fighting at the FCC to avoid carrying any station they do not want to carry if there is any conceivable basis for denying carriage. Clients of this firm are currently experiencing the effects of these policies: commercial stations KHCV(TV), Seattle, Washington, and KFTL-TV, Stockton, California, and noncommercial station WFME-TV, West Milford, New Jersey. EchoStar and DirecTV have insisted that they did not receive carriage requests that were sent to them and are fighting mightily against the stations' must-carry complaints at the FCC, even though the carriers have full knowledge of the requests of the stations to be delivered to markets where local-into-local service will be provided. In other words, the satellite companies seek exactly what Congress was trying to prevent in the legislation -- the ability to pick and choose only the stations they want to carry while depriving stations that provide non-network and noncommercial programming services of their ability to reach local satellite television viewers.

Echostar in particular has missed no opportunity to argue against protecting any rights of broadcasters and has even carried its anti-local broadcast campaign into the transition to digital television broadcasting. For example, in commenting on an FCC proposal to allow television stations with financial or other difficulties to request a deferral of the deadline for commencing digital service, Echostar urged that any build-out waiver granted to a network-affiliated TV station be conditioned on the station's waiving its right to prevent the importation of a distant digital signal of the same network, thus undermining the local exclusivity that is the economic underpinning for network affiliations and slowing the digital transition by impairing the ability of local stations to build their DTV facilities. The FCC rejected that proposal, but it does demonstrate Echostar's lack of concern with, if not outright hostility to, the preservation and distribution of over-the-air broadcast services. *See Review of the Commission's Rules and policies Affecting the Conversion to Digital Television*, Memorandum Opinion and Order on Reconsideration in MM Docket No. 00-39, FCC 01-330, released November 15, 2001, at par. 48.

The merger of EchoStar and DirecTV will create a monopoly entity that will have even more power to act with arrogance and to act as a gatekeeper for the provision of entertainment and information to its growing universe of customers. There will no longer be any competition in satellite delivery. The merged entity will provide whatever services it wants, and those who do not have good cable television service available will have to take it or leave it. The most effective constraint on this monopoly situation would be a healthy competitive environment. A merger between Echostar and DirecTV would eliminate that important marketplace force. We suggest that Congress should seriously question such a result.

Honorable F. James Sensenbrenner
December 4, 2001
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We urge you to request that EchoStar and DirecTV provide detailed information that will enable you better to evaluate their actual performance record in dealing with the broadcast community, including the following:

1. How many television broadcast stations operate in the markets where the carriers provide local-into-local service?

2. How many of those stations requested satellite carriage, and how many did not?

3. How many requests did each carrier reject?

4. What were the reasons for rejection, and how many stations were rejected for each reason? (We understand from an article in *Communications Daily* (Warren Communications, Inc.) on October 19, 2001, pages 3-4, that EchoStar, which reportedly has had the most satellite carriage complaints filed against it, and DirecTV together denied the carriage requests of as many as 200 independent stations, and EchoStar denied all but two of 122 carriage requests by public television stations.)

5. How many carriage complaints are pending against each carrier at the FCC? (On October 15, 2001, the FCC's public notice listed 15 carriage complaints filed against EchoStar.)

6. How many complaints have been settled?

7. On what basis were the complaints settled?

8. What were the program formats and the networks (if any) of the stations with which settlements were reached and the stations with which no settlements have been reached?

9. What policy does the merged entity plan to follow in the future in deciding which broadcast stations it will attempt to exclude from satellite delivery?

10. How many channels will the merged entity be able to provide to any single market? How many of these channels will be devoted to the retransmission of local broadcast signals? (One of the justifications that EchoStar and DirecTV have offered for the merger is that it would reduce the number of channels they will need to devote collectively to the carriage of local broadcast signals.)

The attitude of EchoStar and DirecTV is reminiscent of the bitter fight against carriage of local stations by cable operators many years ago. That fight was finally resolved, after years of lobbying and litigation. The cable industry now distributes all in-market television

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broadcast signals under laws upheld by the Supreme Court. Congress must not allow EchoStar and DirecTV to replay this same battle over the carriage of independent and noncommercial broadcast stations, and it certainly should not endorse a merger that would create a monopoly with increased ability to stifle the smaller stations in the broadcast industry.

Very truly yours,
IRWIN, CAMPBELL & TANNENWALD, P.C.

Alan C. Campbell

Peter Tannenwald

cc: All Committee Members
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NRTC

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January 7, 2002

Chairman James Sensenbrenner
U.S. House of Representatives
Committee on the Judiciary
2141 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner,

Thank you very much for the honor of testifying before your Committee on December 4, 2001, regarding the proposed merger between Echostar and Hughes/DIRECTV.

I have testified numerous times over the past 15 years before Congress on many important issues concerning telecommunications services in rural America. Because of its potential impact on those who live in rural America, no testimony has been as important as this one. Your opening comments and questions indeed help shed some much-needed light on this issue.

Enclosed is some additional information about the C-Band industry. You are correct that it is a rapidly declining technology. According to SkyResearch, at its height of deployment there were 2.3 million subscribers in 1995. Today there are 914,100 subscribers It is currently losing about 30,000 subscribers per month. To tout C-Band as a potential competitor is just plain wrong. Why would people install 8-foot satellite dishes when an 18-inch dish can bring you more services?

The lack of competition in rural areas and all the subsequent problems that it presents regarding prices, service quality, access to existing and new services (such as Broadband), and additional costs to consumers all should make this merger subject to the utmost scrutiny.

Again, thank you for the opportunity to appear before the Judiciary Committee. I also appreciate the kind courtesies extended by your staff, in particular Mr. Will Moschella in both helping to arrange the hearing and the staff briefing.

If I or anyone on my staff can be of any assistance to you please do not hesitate to contact me.

Very truly yours,

Bob Phillips

Bob Phillips
President & CEO

Enclosure

C-Band cont'd from p.1...

Historical C-Band Sub Counts

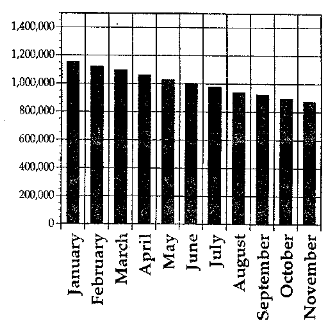
1988	471,608
1989	637,924
1990	715,477
1991	771,458
1992	1,033,264
1993	1,627,935
1994	2,194,516
1995	2,365,415
1996	2,277,763
1997	2,114,001
1998	1,921,624
1999	1,648,690
2000	1,196,012
2001	870,971

Historically, C-Band performed nicely with new authorizations from 1992 through 1995. But, the small dish stifled C-Band's success in the late '90s bringing the 2001 sub count to under 1 million. The data is representative of December's new authorizations between 1988 and 2000. However, the 2001 data is reflective of November's month-end subscriber count. •

Source: Motorola Access Control Center

C-Band's 2001 Demise

January	1,150,811
February	1,117,019
March	1,095,167
April	1,058,385
May	1,025,238
June	1,000,074
July	975,103
August	936,076
September	919,782
October	893,882
November	870,971



The year 2001 hasn't been too kind to C-Band, as far as new authorizations are concerned. In fact, in 2001 alone, subscribers have decreased by 27 percent. •

Source: Motorola Access Control Center

NRTC
National Rural Telecommunications Cooperative
2121 Cooperative Way
Herndon, Virginia
20171-4542
Voice 703 787 0874
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Web www.nrtc.org

NRTC
Memorandum

To: Bob Phillips, Adam Schwartz

From: Chris Martin

Date: December 7, 2001

Re: C-band Subscriber Decline

The C-band industry, as a whole, has been losing subscribers since 1996, and the percentages of the annual decreases have risen dramatically each year since DBS was introduced. We obtained the annual C-band subscriber numbers from SkyRESEARCH. A copy of information from their Web-site is attached. I have calculated annual and monthly subscriber loss as well as percentage of subscribers lost for your convenience.

Date	Subscriber Count	Subscriber Loss	Percentage Subscriber Loss	Average Subscriber Loss/month
Sept 1995	2,364,785	N/A	N/A	N/A
Sept 1996	2,320,104	44,681	2%	3,723
Sept 1997	2,155,361	164,743	7%	13,729
Sept 1998	1,979,021	176,340	8%	14,695
Sept 1999	1,731,723	247,298	12%	20,608
Sept 2000	1,295,563	435,160	25%	36,263
Sept 2001	919,782	375,781	29%	31,315

Source: SkyRESEARCH

DOMESTIC DTH NUMBERS

Satellite Subscriber History

	Total DTH	Total DBS	C-Band	DIRECTV	DISH	ALPHASTAR	PR
Sept '94	2,286,212	190,000	2,096,212	75,000	N/A	N/A	
Sept '95	3,947,785	1,583,000	2,364,785	885,000	N/A	N/A	
Sept '96	5,913,104	3,593,000	2,320,104	1,920,000	190,000	8,000	1
Sept '97	7,676,361	5,521,000	2,155,361	2,892,000	820,000	N/A	1
Sept '98	9,812,346	7,833,325	1,979,021	4,058,000	1,609,000	N/A	2
Sept '99	12,426,723	10,695,000	1,731,723	5,923,000	2,972,000	N/A	1
Sept '00	15,072,563	13,777,000	1,295,563	9,017,000	4,760,000	N/A	
Sept '01	17,690,782	16,771,000	919,782	10,341,000	6,430,000	N/A	

Source: SkyRESEARCH

DTH Subscriber Counts March '00 - Aug '01

	C-Band	DIRECTV	DISH	PRIMESTAR	TOTAL
Mar-00	1,561,399	7,360,000	3,865,000	1,000,000	13,786,399
Apr-00	1,530,609	7,670,000	4,005,000	800,000	14,005,609
May-00	1,502,581	7,960,000	4,155,000	600,000	14,217,581
Jun-00	1,476,717	8,242,000	4,310,000	435,000	14,463,717
Jul-00	1,444,842	8,542,000	4,460,000	280,000	14,762,842
Aug-00	1,328,564	8,864,000	4,612,000	110,000	14,914,564
Sep-00	1,295,563	9,017,000	4,760,000	N/A	15,072,563
Oct-00	1,260,012	9,170,000	4,917,000	N/A	15,347,012
Nov-00	1,228,822	9,370,000	5,102,000	N/A	15,700,822
Dec-00	1,196,012	9,544,000	5,260,000	N/A	16,000,012
Jan-01	1,150,811	9,684,000	5,410,000	N/A	16,244,811
Feb-01	1,117,019	9,800,000	5,535,000	N/A	16,452,019
Mar-01	1,095,167	9,884,000	5,610,000	N/A	16,589,167
April-01	1,058,385	9,994,000	5,845,000	N/A	16,897,385
May-01	1,025,238	9,980,000	5,995,000	N/A	17,000,238
Jun-01	1,000,074	10,059,000	6,070,000	N/A	17,129,074
Jul-01	975,103	10,134,000	6,170,000	N/A	17,279,103
Aug-01	936,076	10,209,000	6,270,000	N/A	17,415,076
Sept-01	919,782	10,341,000	6,430,000	N/A	17,690,782

BroadwaveUSA™
Creating Cable Competition with Northpoint Technology

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December 4, 2001

The Honorable F. James Sensenbrenner, Jr.
Chairman
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
House Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Sensenbrenner and Ranking Member Conyers:

It is with great interest that I note you are today conducting a hearing on "Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market."

Our company is anxious to add competition to this marketplace, yet our entry has been greatly slowed by DBS opposition to our licensing at the FCC. I believe our experiences will be of interest to the committee because they show that alternative technologies do exist and can be made available with appropriate governmental action.

Accordingly, we offer this letter for your consideration to include in the record of today's hearing. Should you or any members of the Judiciary Committee have questions, we would be delighted to answer them for the record.

The Need for Facilities-Based Competition

The fact of the matter is that the state of competition in this marketplace is dismal, and Echostar's acquisition of DirecTV can only make matters worse.

As disclosed in its most recent annual report on competition in video markets, the FCC has certified only one percent of all communities in the United States have effective

The Honorable F. James Sensenbrenner, Jr.
The Honorable John Conyers, Jr.
December 4, 2001
Page 2

competition.[1] EchoStar's acquisition will simply match today's local cable monopoly with tomorrow's national satellite monopoly.

When Congress passed the 1996 Telecommunications Act, many hoped that cable overbuilders would enter the marketplace and create new competition. That, unfortunately, has not come to pass. In fact, these overbuilders have failed to materialize. And if this merger occurs we will see the total elimination of facilities-based competition in satellite service.

DBS has never been a price competitor to cable. If it were, the entry of DBS service should have tempered the rise of cable rates. Yet for the last five years cable prices have increased at 2.2 times the rate of inflation. Remarkably, the cable rate increases appear to have *increased* at a faster pace after DBS service began in December 1994.[2] Clearly, a form of competitor to cable other than DBS is needed if consumers are ever going to enjoy the higher quality and lower prices that have been realized in other areas such as personal computers, long distance services, and consumer electronics.

For almost eight years now, our company has stood ready to offer consumers a new, facilities-based alternative to cable and DBS service. We can provide a uniform high quality of service in all 210 local markets in the country. We would offer your consumers access to 96 channels of video programming for $20/month and high speed access to the Internet for just another $20/month.

Nearly three years ago I testified before another Committee of the House which was examining reauthorization of the Satellite Home Viewer Act. Let me repeat to you a commitment I made then, which still holds true today: "Once regulatory approval is achieved, our service can be deployed in the first markets in as little as six months, with nationwide coverage within two years."[3]

In the period of time since that testimony, Northpoint could have fully built out our entire network, offering all of your constituents the choice of a low-cost alternative to cable and satellite.

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[1] 7th Annual Report on Competition in Video Markets, Jan. 8, 2001, paragraph 138.
[2] Bureau of Labor Statistics, comparison of monthly cable prices and consumer product index.
[3] Statement of Sophia Collier before the House Commerce Subcommittee on Telecommunications, Trade and Consumer Protection, February 24, 1999.

The Honorable F. James Sensenbrenner, Jr.
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December 4, 2001
Page 3

Satellite Opposition to New Competition

The only reason that our service is not deployed today is because the satellite incumbents have used the regulatory process to slow our progress toward approval to a crawl. Initially they tried to turn our licensing process into a Catch 22 – we can't be licensed until we can prove that we won't cause interference to DBS, but we shouldn't be given any experimental licenses to demonstrate our abilities. With strong support from Members of Congress, we have been able to successfully demonstrate our technology in Kingsville, TX, Austin, TX, and Washington, DC.

But rather than invest in the infrastructure of our system, we've invested millions in legal fees.

Few small companies with new technologies could sustain the kind of multi-year assault from entrenched incumbents that we've experienced. In the end, when incumbents are permitted to abuse the regulatory process to keep out new competition, its not the prospective entrepreneurs that suffer the greatest loss, its consumers who are denied the opportunity to select from alternative providers who can offer better service and lower prices.

Northpoint is not concerned about our ability to compete effectively against New EchoStar. What we do fear, however, is that the new satellite monopoly will leverage its power to ratchet up the satellite industry's eight-year campaign to keep us out of business.

EchoStar's continued opposition to our service – at a time in which EchoStar desperately needs to demonstrate to antitrust and FCC regulators that there will be sufficient competition in the MVPD marketplace after its merger – attests to the depth of its commitment to keep us out.

I hope members of the Committee share Northpoint's frustration at our slow progress towards the marketplace. As you consider the merits of the EchoStar consolidation of the satellite industry, I ask that you examine how that company has been treating this would-be competitor.

The Honorable F. James Sensenbrenner, Jr.
The Honorable John Conyers, Jr.
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Local Channels

The proponents of the merger have asserted that they need to consolidate so that they can deliver local channels to more markets. This statement further confirms our long-standing assertion that satellites are ill-suited to carry local TV stations.

Even though a single company will control 100% of the spectrum allocated to DBS service, the proponents of the merger themselves concede they will still lack the capacity to serve even a *majority* of the 210 local television markets. But even assuming the merger goes through, the public must wonder if it can count on EchoStar to make good on its claim to serve 100 markets. EchoStar's record is one of seeking to avoid local carriage, not foster it.

Recall that EchoStar supported enactment of legislation to enable it to carry local channels, but later led an industry lawsuit seeking to over turn the must carry component of the law, a compromise that was critical to ensuring the legislation's passage.

Earlier this year the satellite industry ridiculed my prediction, published in *Broadcasting & Cable* magazine, that on January 1st – just in time for the college Bowl games – the DBS companies would likely drop local television stations in dozens of markets in order to comply with the must carry law.[4] Now comes word – from none other than EchoStar CEO Charlie Ergen himself – that EchoStar will be forced to take down local programming in several markets.[5]

Many fans of the hit show "Survivor" won't be able to see the next contestant to be eliminated because EchoStar will have eliminated their ability to watch the local CBS affiliate. Which markets will be exiled in this EchoStar version of "Survivor"? Stay tuned for the answer on January 1st.

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[4] See "Technology validated: Northpoint asks FCC to proceed with license – at last," Sophia Collier, *Broadcasting and Cable*, June 11, 2001; "Fears of interference: DBS 'fights tooth and nail' to protect customers, investment," Chuck Hewitt, *Broadcasting and Cable*, June 25, 2001.

[5] "ECHOSTAR SURPRISES WITH RECORD-BREAKING QUARTER," *Communications Daily*, October 24, 2001: "Ergen said EchoStar 'may be forced to take down' local TV programming in several markets to comply with must-carry rules because EchoStar 7 won't be launched in time to meet increased demand. He indicated eliminating service was last resort, but finances would be major determinant in decision. 'We have some markets where we offer 22 channels and there are only a couple of thousand' subscribers. [']We are going to make sure' where service is offered 'makes economic sense... We're going to have to make some tough choices.'"

Nevertheless, if the public is still willing to assume that New EchoStar will try to serve 100 markets, this won't come about until it addresses the incompatibility between the existing DirecTV and EchoStar set top boxes. This lengthy process will slow the provision of local channels.

Finally, these 100 markets that New EchoStar claims it will serve with local channels leave behind the people who would benefit most from getting local channels via satellite. That is, the states with the highest penetration of DBS service (and usually the lowest penetration of cable service) are least likely to get local channels via New EchoStar.

Specious Claims of Interference

The satellite industry says it has no problem with Northpoint's terrestrial service – so long as it operates in another spectrum band. The FCC has rejected this specious, self-serving excuse.[6]

DBS satellites today share the 12 GHz band with each other, enabling a tremendous amount of spectrum to be reused over and over again. DBS satellites in the 12 GHz Ka Band are stationed nine degrees apart over the equator; in the Ku Band, similar satellites are stationed just two degrees apart.

Northpoint's patented technology brings satellite spectrum sharing principles down to earth. We avoid interference by transmitting in a southerly direction, right into the back end of DBS subscribers' reception dishes, which serves as a shield to our transmissions.

The FCC has noted that in all of the tests of our system, not a single DBS subscriber has suffered an outage,[7] despite the satellite industry's dire predictions that interference was "unavoidable" for "tens of thousands" of subscribers.[8]

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[6] First Report and Order, ET Docket No. 98-206, paragraph 168 (November 29, 2000): "These [other] bands either do not offer the same amount of spectrum, are encumbered by existing operations, impose higher equipment costs, or have significant propagation constraints. The use of innovative spectrum sharing techniques will facilitate a high level of frequency reuse in this [12 GHz] band and provide a variety of broadband services to a vast number of consumers."
[7] FCC First Report and Order, paragraph 215.
[8] DirecTV *ex parte* filing urging the FCC to reject Northpoint's experimental testing in Washington, DC, June 23, 1999.

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Based on these successful tests, the FCC established the Multichannel Video Distribution and Data Service (MVDDS). The FCC found that it would be in the public interest for the DBS industry to share the 12 GHz band with terrestrial services such as ours.[9]

Clearly, the FCC would not have established MVDDS unless it was confident that satellite-terrestrial spectrum sharing is indeed feasible. Congress sought and obtained further confirmation that terrestrial operations would not harm DBS customers when it directed the FCC to commission an independent test.[10] The FCC selected the MITRE Corporation, which unequivocally concluded, and I quote, "MITRE believes that with implementation of the licensing process and other policy recommendations outlined above, spectrum sharing between DBS and MVDDS services in the 12.2-12.7 GHS band is feasible."[11]

DBS: Hold Auctions, But Not For Satellites

The satellite industry's latest line of attack is to subject us to a burdensome licensing process to which satellites are not required to endure. They say we should have to pay for the right to share the spectrum they were given for free.

Here are the facts:

The FCC awarded DBS operators in the 12 GHz Ku Band almost 6,000 MHz of spectrum without an auction.[12] In contrast, we are seeking just 500 MHz. True, EchoStar did buy some extra spectrum, but that was in addition to the 3,075 MHz of spectrum it had already obtained for free.[13] DirecTV has never participated in an auction for its spectrum.

While the FCC did auction two partial orbital slots[14], this must now be viewed as an anomaly. Just a few months ago, the FCC awarded 66,000 MHz of auction-free spectrum

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[9] First Report and Order, paragraph 167.
[10] Public Law 106-553, Title X, "Launching our Communities' Access to Local Television Act of 2000," Section 1012 – "Prevention of Interference to Direct Broadcast Satellite Services."
[11] *Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band*, MITRE Corporation, page 6-8 (April 23, 2001).
[12] "DBS Orbital/Channel Assignments," http://wireless.fcc.gov/auctions/data/maps/dbs.pdf. (Based on FCC's assignment of 185 transponder channels without an auction. Each orbital slot allocates 1,000 MHz of spectrum to 32 transponder channels, i.e., 31.25 MHz/transponder channel times 185 = 5,781.25 MHz.)
[13] Northpoint *ex parte* letter to Chairman Powell, Appendix C (November 28, 2001).
[14] January 25-26, 1996, 24 channels at 148 degrees; 28 channels at 101 degrees.

to 11 satellite companies – including EchoStar, DirecTV and Pegasus – who will provide DBS-type service in the Ka Band.[15]

We are in a proceeding at the FCC with eight non-geosynchronous orbiting satellites (NGSOs) who applied on the same day as us to use the same spectrum.[16] The FCC determined that we can all share the spectrum safely with one another and with DBS incumbents, but only our application is being contemplated for an auction.[17] To put this in perspective, the NGSOs seek 25,400 MHz of spectrum; we seek just 500 MHz – more than a 50:1 ratio!

How is this so? Why would the FCC discriminate against applications solely on the basis of technology? The answer is, with respect to the satellite applications, federal statute prevents the FCC from conducting an auction.[18] (While our applications were pending, the satellite industry sought and obtained an exemption from auctions as a rider to the ORBIT Act, the legislation which privatized Intelsat and Inmarsat.)

We firmly believe that this statutory exemption should apply to the spectrum used by satellites and not just to the satellites themselves. Certainly a statutory clarification is needed to end the obvious competitive advantage it bestows upon satellites at the expense of terrestrial competitors that would use the same spectrum.

Putting aside the need for parity, the FCC still lacks the authority to hold a spectrum auction in our case because there are no mutually exclusive applicants before it. Northpoint Technology alone submitted technology for the independent MITRE test, a statutory requirement. Another company, MDS America, has advocated an auction, but apparently because of its foreign ownership, the company has not filed an application.

Northpoint's technology is patented and has been licensed only to its Broadwave affiliates. To wait for new and unknown innovators to come forward with a non-infringing technology, just for the purpose of holding a spectrum auction, cannot be considered good public policy. American consumers need new service now.

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[15] FCC Ka Band "Second Round" Order, DA 01-1693 (August 2, 2001).
[16] ET Docket No. 98-206.
[17] First Report and Order and Further Notice of Proposed Rulemaking, paragraphs 331 – 339.
[18] Public Law 106-180, Section 647 – Satellite Auctions: "Notwithstanding any other provision of law, the Commission shall not have the authority to assign by competitive bidding orbital locations or spectrum used for the provision of international or global satellite communications services."

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Set Top Box Standardization

If the merger is approved, at a very minimum conditions must be imposed to ensure that customer set top boxes are open to competitive services.

These conditions would replicate the "open access" and "interoperability" regulations now required of cable operators and cable boxes. They would allow new terrestrial providers to offer competitive services to EchoStar customers to either complement (e.g., local channels and high speed Internet) or completely replace EchoStar service. Consumers should be free to choose to switch providers without losing their investment in equipment.

The FCC reached a similar conclusion with respect to the new satellite radio service, for which it has ruled that all Digital Audio Radio Service (DARS) operators must design their receiver for interoperability with all other DARS operators.[19]

In practical terms the new regulations should be implemented at the same time that EchoStar standardizes its set top boxes. Instead of providing a closed set top box that can only receive its service, EchoStar should be required to provide all of its customers a box that is open to competition. All future set top boxes should be required to be designed according to these regulations.

In order for this to be effective the following three principles should be observed.

- All DBS boxes must conform to an open (non-proprietary) standard such as the DVB protocol or other open-standards based (freely available) transmission protocol so that these boxes can be connected to new terrestrial providers.

- All DBS boxes must have separate conditional access, as the rules require for cable boxes.

- Add on or proprietary features should be allowed but must be designed as removable modules (similar to PC cards, for example) such that the basic functionality of the set top box is not disturbed by adding or removing proprietary features.

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[19] 47 CFR §25.144 (a)(3)(ii)

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The Honorable John Conyers, Jr.
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Program Access

Before concluding, I would like to comment on an important matter on which I believe we share common views with the DBS industry and that is program access.

Section 628 of the Communications Act prohibits exclusive contracts between vertically integrated programming vendors and cable operators. Congress recognized that cable operators enjoyed a monopoly in program distribution at the local level and concluded that exclusive contracts would further inhibit competition and diversity. This provision will sunset on October 5, 2002, unless the Commission determines it continues to be necessary.

The Commission has noted that the purpose of the restrictions on exclusive contracts for this ten year period were intended to foster development of emerging competitors to cable, allowing a transition to a competitive market for the distribution of programming. Regrettably the transition to the competitive market envisioned by Congress in 1992 has not occurred, as cable still maintains its 80% monopoly in the MVPD marketplace.

Instead of seeing greater diversity of programming, industry consolidation threatens to limit consumer choice. Through its TCI and Media One mergers, AT&T became the largest cable operator. AOL, which already dominated the ISP landscape, acquired Time Warner, becoming the second largest cable operator. Now, number 3 Comcast, poised to merge with AT&T Broadband, would overtake AOL/Time Warner and become the largest vertically integrated cable operator. Nearly a decade after Congress insightfully prohibited exclusive contracts, programming content and distribution is even more firmly entrenched in the hands of a few powerful cable companies.

Content is crucial in order for competitors to attract and retain viewers. Given the recent and substantial industry consolidation, it's even more critical today to maintain the prohibition on exclusive contracts. If incumbent cable providers are permitted to use their market dominance to inhibit competitors' access to programming, competitors will not survive. The ultimate loser will be the American people who will be denied the benefits of competition and diversity.

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The Honorable John Conyers, Jr.
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Conclusion

Northpoint has been seeking approval for almost eight years. It has invented and proven a new technology that can provide low cost services to consumers who currently lack service and/or competition. Although entrenched incumbents such as the DBS industry have opposed Northpoint, we have continued to seek licenses and strongly believe our services are now needed more than ever.

I would like to conclude by reiterating my offer, made nearly three years ago, to fully deploy our system throughout all 210 television markets within two years.

Sincerely,

Sophia Collier
President

cc: Members of the Judiciary Committee:
Hon. Henry Hyde
Hon. George Gekas
Hon. Howard Coble
Hon. Lamar Smith
Hon. Elton Gallegly
Hon. Bob Goodlatte
Hon. Ed Bryant
Hon. Steve Chabot
Hon. Bob Barr
Hon. William Jenkins
Hon. Chris Cannon
Hon. Lindsey Graham
Hon. Spencer Bachus
Hon. John Hostettler
Hon. Mark Green
Hon. Ric Keller
Hon. Darrell Issa
Hon. Melissa Hart
Hon. Jeff Flake

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The Honorable John Conyers, Jr.
December 4, 2001
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Hon. Mike Pence
Hon. Barney Frank
Hon. Rick Boucher
Hon. Howard Berman
Hon. Jerrold Nadler
Hon. Bobby Scott
Hon. Melvin Watt
Hon. Zoe Lofgren
Hon. Sheila Jackson Lee
Hon. Maxine Waters
Hon. Marty Meehan
Hon. William Delahunt
Hon. Robert Wexler
Hon. Tammy Baldwin
Hon. Anthony Weiner
Hon. Adam Schiff

November 29, 2001

The Honorable S. James Sensenbrenner, Jr.
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Re: Echostar-DirecTV Merger

Chairman Sensenbrenner:

As the only national, television network currently broadcasting and dedicated to serving the needs, and interests, of rural America, please allow our unique perspective and views to be a part of the permanent record regarding the merger of Echostar with DirecTV.

RFD Communications, Inc.,(RFD-TV) is a nonprofit, 501(c) corporation that qualified under FCC guidelines to provide Public Interest programming. Based in Dallas, Texas, RFD-TV is uplinked via Ku-band satellite for distribution to all 50 states. Beginning on December 15, 2000, this 24-hour schedule has been a part of Echostar Communications Corporation's basic programming package on DISH Network's channel 9409, and has been provided free-of-charge to all DISH Network subscribers as a result of RFD's Public Interest Programming Agreement with Echostar.

Broadcasts serve a wide-variety of interests throughout rural America, with educational and informational programming that has not been available from any other broadcast source. Over the past year, programming blocks have originated and/or featured the following rural organizations:

- American Farm Bureau – 5.1 million members
- FFA – 455,000 members and 8,000 individual chapters
- 4-H Council– 4.5 million members
- Pork Board – 85,000 producers in 44 states
- Cattlemen's Beef Board – 37,000 members and 100,000 producers
- Corn Growers Association – 30,000 members and 300,000 producers
- Wheat Growers – 20,000 members
- Soybean Association – 30,000 members
- National Dairy Board – 20,000 producers
- Cotton Council
- American Quarter Horse Association – 3.9 million horses/owners
- Thoroughbred Breeders Association
- American Sheep Industry

- USDA – weekly news stories, features, and documentaries
- National Association of County Agricultural Agents – 4,500 members
- USDA Natural Resources Conservation Service – self-help videos and information
- Ag in the Classroom
- California Farm Bureau
- Georgia Farm Bureau
- Louisiana Farm Bureau
- Kentucky Farm Bureau
- Tennessee Farm Bureau
- Arkansas Farm Bureau
- Texas Farm Bureau
- Indiana Farm Bureau
- Michigan Farm Bureau
- Idaho Farm Bureau
- Virginia Farm Bureau
- Florida Department of Agriculture
- Farm Safety 4 Just Kids
- South Carolina Extension Service
- University of Tennessee Extension Service
- Oklahoma State Cooperative Extension Service
- University of Minnesota Division of Agricultural, Food, and Environmental Education
- University of Florida Agricultural Education & Communication
- Kansas State College of Agriculture
- Louisiana State University College of Agriculture
- New Mexico State University College of Agriculture and Home Economics
- Texas A & M University College Department of Agricultural Education
- Penn State Department of Agriculture & Extension Education
- Purdue University Agricultural Education
- Cornell College of Agriculture and Life Sciences
- University of Wisconsin Learning Institute
- National High School Rodeo Association

During this coming year, many of the state and national organizations that are not listed are gearing up and will begin to produce and feature their rural programming on RFD-TV. At this time, most are absent only due to their lack of available programming and features, which is primarily a result of the reality that, until capacity on DBS was recently expanded, there had been no viable distribution system in place that could, or would, feature their interests to a large enough audience to justify this effort, and expense. Urban-based broadcast stations bury this programming in the early morning hours or do not give exposure to these interests whatsoever, cable does not reach the households that are the primary target of this information, and a fragmented DBS industry with entities of somewhat limited channel capacity focused, understandably, on the largest population centers first with available bandwidth.

Response from the audience, both rural and urban, and the above organizations, and their members, which have been able to receive the RFD-TV broadcasts has been "off-the-charts." Hundreds of thousands of e-mails and letters of support have poured in, and all send one clear message – "It's about time that someone paid attention to rural America."

The April 12, 1993 cover story of TIME magazine focused the majority of that issue with articles on "Coming Soon to Your TV Screen - The Info Highway – Bringing a revolution in entertainment, news and communication". It is the firm belief of RFD-TV that this Information Superhighway must go down each and every country road. Some of the predictions have come true, yet most are still on the verge of becoming a reality. Based on our unique feedback from the rural homeowner and major rural associations, and RFD's long-term experience in dealing with the realities of the structure that would need to be in place to make this goal viable, in today's climate, it is clear that the following are the realities:

1. Direct broadcast satellite is the best possible solution to provide 21st century communication services, including high-speed internet, local broadcast stations, and "special interest" channels to rural America.
2. In order to provide these services, the distributor/provider must have the capacity and bandwidth that would be necessary to adequately serve these isolated markets.
3. This capacity must be in the hands of an entity that understands the challenges of the rural market, and with the experience of dealing with these challenges, who also has a proven track-record of serving rural America's best interests.

It is the strong opinion of RFD that the proposed merger of Echostar and DirecTV creates the best possible scenario to provide these services to rural America. There is no alternative other than DBS satellite delivery to cover the entire country. Bandwidth capacity would be in place that would allow for the economics of providing expanded services to the "smaller" markets. And, Echostar's 20-year history of being a leader in the evolution of providing satellite service for rural America is without question. It is a fact that RFD-TV has been offered to every other broadcast, cable, and DBS distributor, and to date, only Echostar and DISH Network made the commitment to carry this important service for rural America, and on Echostar's main satellite location.

It is also our experience from working directly with the various entities that have controlled distribution over the last six years, that capacity is the number one obstacle preventing the expansion of all services to rural America. Duplication of the same television channels distributed to rural homes has clearly evolved into a waste of available bandwidth. This problem is best solved with the Echostar and DirecTV merger, as the highest possible number of channels will be available to expand, and improve, the pipeline to better serve all Americans.

Attached is a representative sample of the thousands of e-mails that have recently been received by RFD-TV from DirecTV customers. I believe that I would speak for all RFD-TV viewers who would confirm their strong support for this merger and this expansion of satellite-delivered services and options for rural areas.

RFD stands for Rural Free Delivery. Just as our U.S. Post Office began delivering mail, news and information, directly to rural homes 105 years ago and changed communication forever, the merger between Echostar and DirecTV has this same potential impact. Finally, the availability of communication services will be equal between the city and country folks, and the potential to provide an expansion of beneficial, much-needed, and long overdue services will be put in motion.

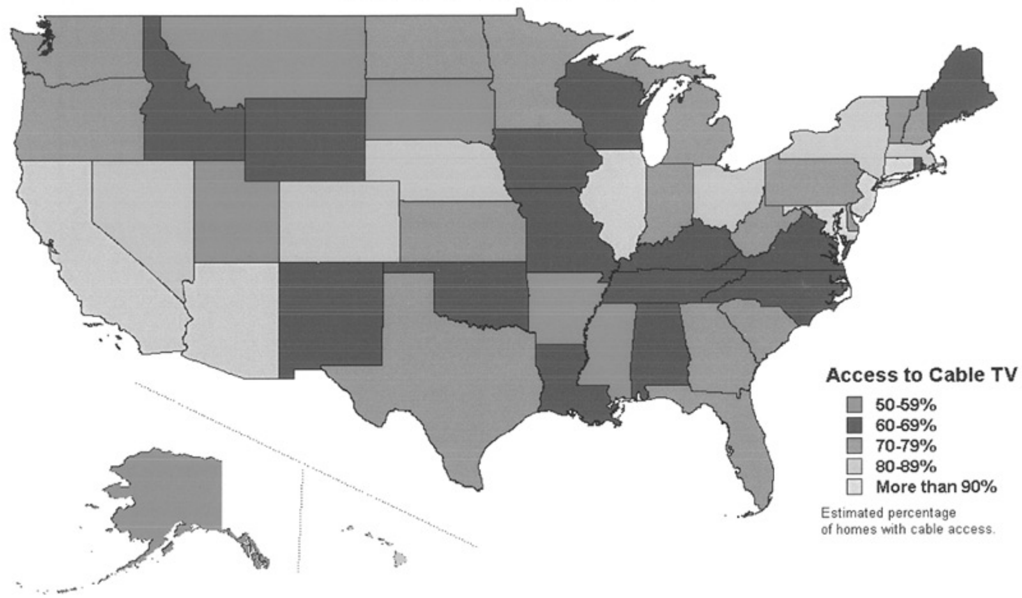
Thank you for the opportunity to express our opinions and provide input for this important decision. We are available, at anytime, should you have any questions.

Sincerely,

Patrick Gottsch
President
RFD Communications, Inc. (RFD-TV)
4101 International Parkway
Carrollton, TX 75007
(972) 309-5801

Cc: The Honorable John Conyers
The Honorable Lamar Schmidt
The Honorable Sheila Jackson Lee
The Honorable Dick Armey

Housing Units with Access to Cable



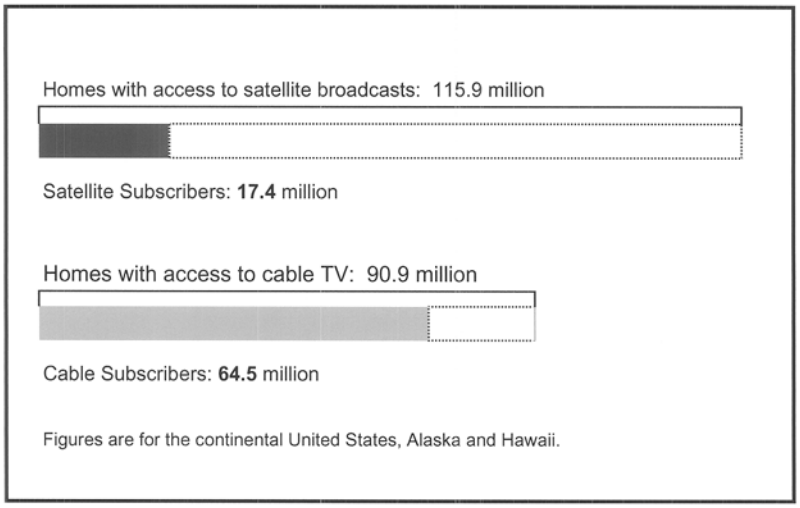
Sources: The New York Times (National Cable and Telecommunications Association, Census Bureau,
SkyRESEARCH, Satellite Broadcasting and Communications Association of America, Kagan World Media)

Housing Units with Access to Cable

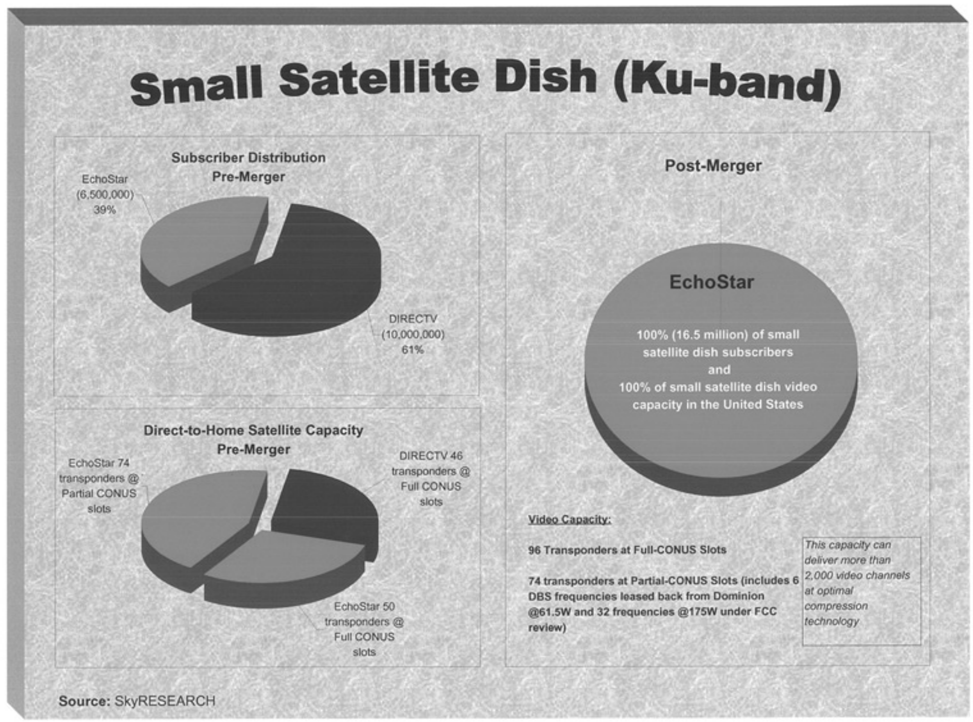
STATE	Estimated percentage of housing units with cable access.
Alaska Arkansas Mississippi Montana South Dakota Utah Vermont	50 - 59%
Alabama Idaho Iowa Kentucky Louisiana Maine Missouri New Mexico North Carolina Oklahoma Rhode Island Tennessee Virginia Wisconsin Wyoming	60 - 69%
Delaware Florida Georgia Indiana Kansas Michigan Minnesota New Hampshire North Dakota Oregon Pennsylvania South Carolina Texas Washington West Virginia	70 - 79%
Colorado Hawaii Massachusetts Nebraska Nevada New York Ohio	80 - 89%
Arizona California Connecticut District of Columbia Illinois Maryland New Jersey	More than 90%

Sources: The New York Times (National Cable and Telecommunications Association, Census Bureau, SkyRESEARCH, Satellite Broadcasting and Communications Association of America, Kagan World Media)

ACCESS AND SUBSCRIBERS: SATELLITE VS. CABLE



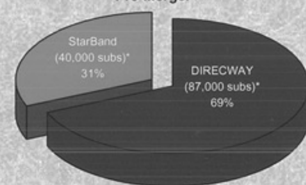
Sources *: The New York Times (National Cable and Telecommunications Association, Census Bureau, SkyRESEARCH, Satellite Broadcasting and Communications Association of America, Kagan World Media)*



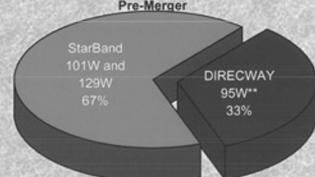
If the EchoStar/Hughes merger is approved, EchoStar would control video distribution to all small satellite dish subscribers.

High-Speed Internet (Ku-band)

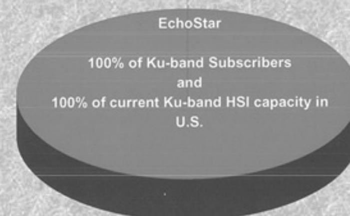
Subscriber Distribution Pre-Merger



Two-way High Speed Internet Satellite Capacity Pre-Merger



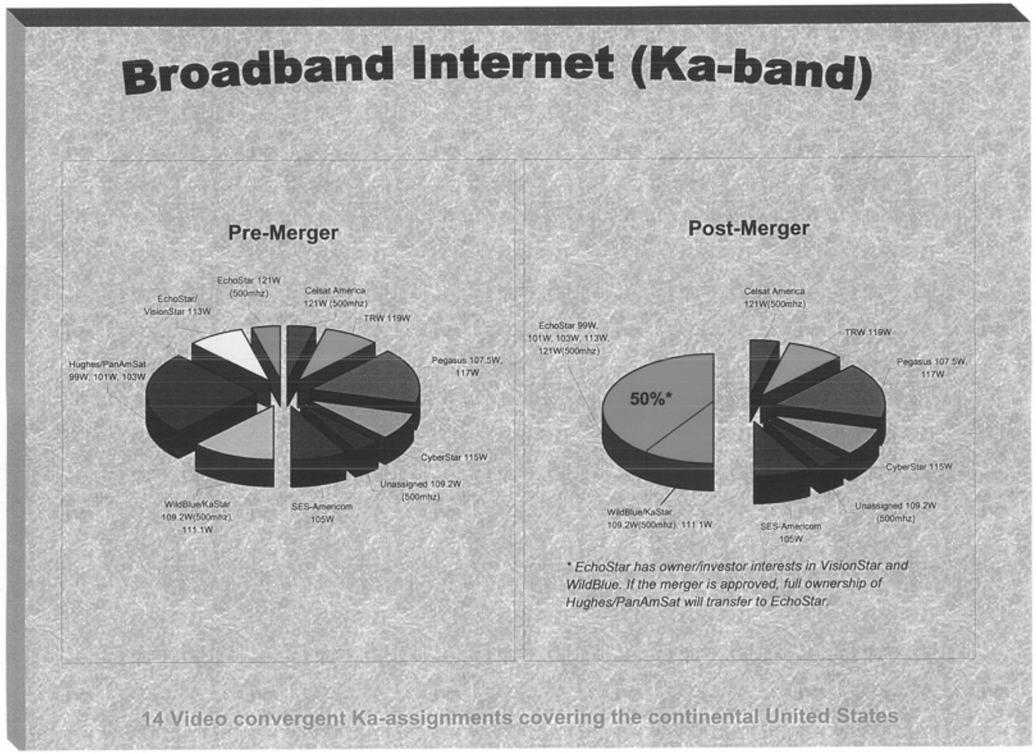
Two-way High Speed Internet Post Merger



* Source: Hughes Q3 Earnings Release (includes enterprise, one-way and two-way subscribers) and StarBand Press release, June 2001 (includes two-way residential/SoHo subscriber only).

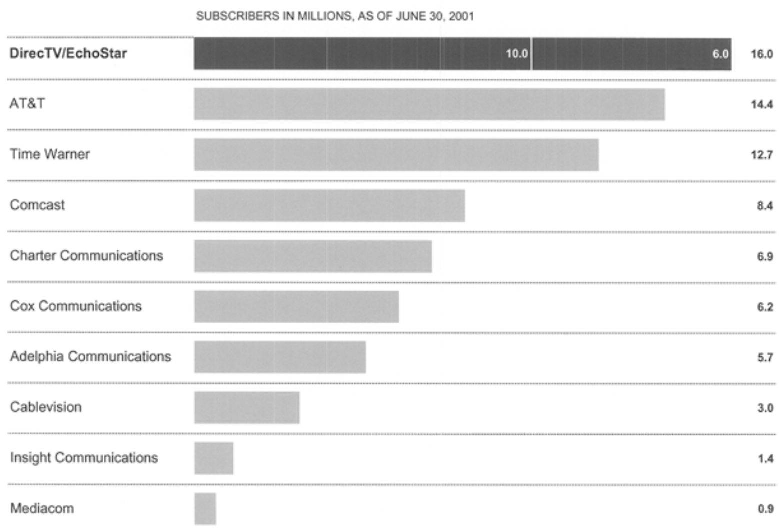
** DIRECWAY - two-way HSI Services only

EchoStar currently has controlling equity stake in StarBand. If the EchoStar/Hughes merger is approved, EchoStar would gain control of DIRECWAY as well. Post merger, EchoStar would control the delivery infrastructure for 100% of the Ku-band high speed internet subscribers.



- **If the EchoStar/Hughes merger is approved, EchoStar will have ownership interest in 50% of the satellite assignments that allow a customer to receive both video and broadband internet using a single satellite dish.**

Size of Video Distributors Post DirecTV/EchoStar Merger



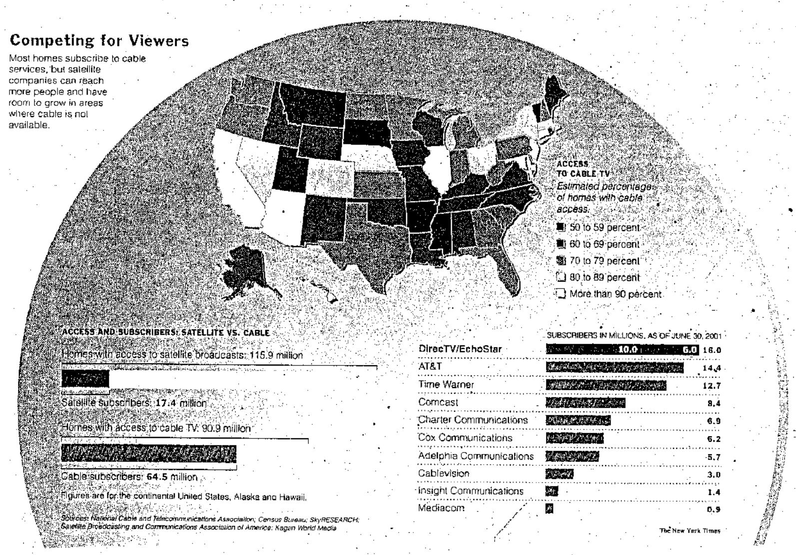
Sources: *The New York Times (National Cable and Telecommunications Association, Census Bureau, SkyRESEARCH, Satellite Broadcasting and Communications Association of America, Kagan World Media)*

Business Day

TUESDAY, OCTOBER 30, 2001

The New York Times

Look, Up in the Sky! Big Bets on a Big Deal



Now, the Difficult Gamble: Approval in Washington

By SETH SCHIESEL

[illegible]s much as Charles W. Ergen, the chairman of [illegible]tar Communications, had to struggle to persuade the [illegible]ral Motors board to accept his $25.8 billion bid for G.M.'s Hughes Electronics unit, he now faces the even tougher task of selling the deal in Washington.

News Analysis

Many industry analysts say the takeover may win relatively easy approval from the Federal Communications Commission and its pro-business chairman. But they say it will probably face a far more strenuous review by the antitrust division of the Justice Department because it would combine the nation's No. 1 satellite television company — Hughes's DirecTV unit — with EchoStar, the No. 2 player.

Even a lawyer involved in the final negotiations between G.M. and EchoStar estimated the chance of the merger's passing antitrust muster at only 65 percent. Some antitrust experts said the odds were much worse.

After 18 months of drawn-out negotiations and one frantic weekend of brinkmanship, G.M. announced yesterday that it had agreed to sell Hughes to EchoStar for $25.8 billion in cash and stock. The companies completed their agreement late Sunday night after G.M. had come within hours of striking a pact with the News Corporation on Saturday afternoon.

The News Corporation, controlled by Rupert Murdoch, is now likely to lead the lobbying against the deal in Washington. Even before last weekend, the company had lined up some powerful members of Congress to voice their opposition to an EchoStar deal on antitrust grounds.

The deal with EchoStar does seem to raise antitrust issues. While most United States consumers now have three choices for pay television — DirecTV, EchoStar's Dish Network and a local cable operator — this deal would reduce the number of choices to two: a satellite company and a cable com[illegible] The roughly nine million [illegible] with no access to cable would [illegible] with a choice of service by a satellite company or no service at all.

"I think there is about a one-in-three chance that this gets approved," said Scott C. Cleland, chief executive of the Precursor Group, a highly respected investment research firm in Washington. "It discourages new market entrants. It creates less incentive for innovation. It eliminates the most direct competition."

"DirecTV and EchoStar are whipping cable in the marketplace today," he said. "There is no legitimate argument why they have to merge to compete with cable. If this was decided on the antitrust merits, it would be an obvious blockage."

DirecTV has about 10.3 million subscribers. EchoStar, which uses the Dish Network brand, has about 6.4 million. Merged, they would be a leviathan with 16.7 million customers, more than even the biggest cable television provider, AT&T, which has about 14.4 million.

The last major deal in media or communications to be rejected on antitrust grounds was MCI WorldCom's pact to acquire the Sprint Corporation last year. That deal fell apart amid objections from both European and United States antitrust officials about how much power the combined company would have in lo[illegible]ance communications mar-k[illegible]

[illegible]news conference yesterday, however, Mr. Ergen said that his deal and the Sprint deal were as different as apples and oranges.

He may be right, but perhaps not in the way he intended.

Reuters

"I don't make bets that are not strongly in our favor."

CHARLES W. ERGEN
Chairman of EchoStar Communications

WorldCom and Sprint were — and remain — No. 2 and No. 3 in a market that includes hundreds of players. But DirecTV and EchoStar are the top two in a market, satellite television, that includes no other major players. Even if the relevant market is defined as pay television — which is EchoStar's definition — there is still only one other provider, the local cable company.

WorldCom and Sprint, moreover, were facing the imminent entry into their business of huge companies that already had millions of customers: the Bell local phone titans. Despite all the competition, the WorldCom-Sprint deal was rejected on antitrust grounds.

In the pay television business, no outside companies are poised to jump into the market. What is more, of the homes with no access to cable, it appears that more than six million now subscribe to satellite television services, according to figures from Michael Goodman, an analyst for the Yankee Group, a research firm in Boston.

Blair Levin, a chief of staff at the F.C.C. during the Clinton administration, said: "There is a very simple antitrust analysis that says it should be rejected. It is very straightforward. The courts would uphold you. You can explain to the public very clearly why you're not approving it. In a highly concentrated market like this, to remove one of three competitors, or in some cases one of two competitors, is simply not pro-competition."

Despite such sentiments, and despite the political influence of the News Corporation — the owner of the Fox broadcast network, the Fox News Channel and newspapers including The New York Post — the EchoStar deal does have supporters.

Some regulatory experts and watchdogs argue that combining EchoStar and DirecTV would create a more effective competitor to cable companies — even if it meant fewer pay television competitors.

If the EchoStar deal was rejected, G.M. would probably end up selling Hughes and DirecTV to the News Corporation. For some experts, fear of Mr. Murdoch's market power appears to outweigh any antitrust concerns about EchoStar. In fact, some experts say that a combined EchoStar-DirecTV might keep a lid on cable prices and deliver additional services to consumers.

"With conditions to protect that small universe of rural subscribers, this deal could actually provide overall benefits to consumers," said William E. Kennard, the last F.C.C. chairman during the Clinton administration, who is now a managing director at the Carlyle Group, the big private equity investment firm. "EchoStar is not a vertical company; it does not own significant programming assets, unlike News Corp. You have the potential for a company that has a lot of channel capacity and fewer connections to the content business than the News Corp. folks actually providing a platform for new program distribution."

James C. Goodale, a media lawyer in New York with Debevoise & Plimpton, expressed similar sentiments. "My view is that it will be approved," he said. Using media shorthand for direct-broadcast satellites, he added: "The reason that it will be approved is that cable operators need competition. I do not think that 17 million D.B.S. users constitute any kind of antitrust threat by itself. And if it does, it seems the benefits outweigh the risks."

Such an argument may find resonance at the F.C.C. Its current chairman, Michael K. Powell, has indicated that he is not generally inclined to block media mergers.

Rooftop installation of a DirecTV disc. DirecTV, the nation's No. 1 satellite television company, has about 10.3 million subscribers.

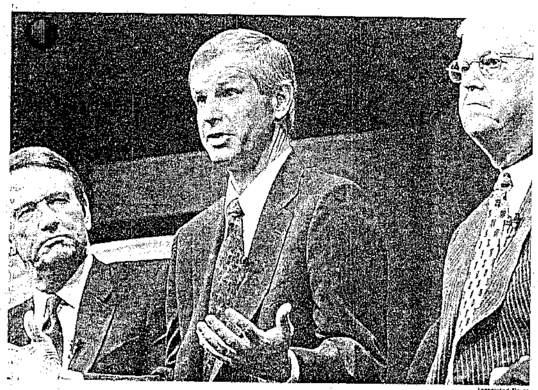
There is a small chance that the Federal Trade Commission could take over the antitrust review, but Washington lawyers note that the Justice Department has reviewed satellite deals in the past. Thus the real battle, it seems, will be at the Justice Department.

"Substantively, this transaction is about competing with cable," said a lawyer, Peter D. Standish of Weil, Gotshal & Manges in New York.

If G.M. and EchoStar are able to frame the question that way, and have antitrust officials consider it on those terms, they stand a chance in Washington. But if the officials focus on the number of players in any one market, the companies may have a far harder time of it.

Passing antitrust muster on this deal is given long odds.

THE NEW YORK TIMES, TUESDAY, OCTOBER 30, 2001



Associated Press

G. Richard Wagoner Jr., left, of General Motors with Charles W. Ergen of EchoStar and Jack A. Shaw of Hughes Electronics yesterday in New York, where they announced that EchoStar would buy Hughes.

Trying to Stack the Deck on DirecTV

Trying to Stack the Deck So Even a Loss Is a Win

By ANDREW ROSS SORKIN

Before he began selling giant satellite dish systems door-to-door with his wife in 1980, Charles W. Ergen, the chairman of EchoStar Communications, used to play the blackjack tables. To improve his chances, he learned to count the cards the dealer played out, becoming so good that he was even kicked out of a Las Vegas casino.

Once again Mr. Ergen has found a way to tilt the odds in his favor. Yesterday, he won his biggest bet of all, beating out Rupert Murdoch's News Corporation for EchoStar's sole American rival, DirecTV, with a $25.8 billion offer. At the last minute, he even put $2.75 billion of his own cash on the table.

But Mr. Ergen is almost assured not to lose even if the deal to combine the nation's two largest satellite television companies is eventually blocked by Washington on the ground that it would be anticompetitive. For no matter what happens with regulators, he will be able to pore over his rival's books, effectively prevent DirecTV, now owned by General Motors, from outpacing his own company — and keep his prize out of the hands of Mr. Murdoch for at least another year.

Even Mr. Ergen acknowledged he has an edge. "I don't make bets that are not strongly in our favor," he said in an interview yesterday. "It is probably still a slight win for everybody if we don't complete the deal."

If worst comes to worst, how much does EchoStar have at risk for all this? A modest $600 million breakup fee and being forced to pay about $5 billion for the PanAmSat Corporation, a provider of satellite-services to commercial customers that Mr. Ergen has said he wanted anyway.

And if the deal goes through, Mr. Ergen would immediately vault into the upper ranks of television's power brokers, reaching nearly 17 million subscribers, more than the nation's largest cable television operator, AT&T Broadband.

Mr. Ergen, 48, said he had been waiting for this moment almost since he got into the business two decades ago as a means of "trying to put food on the table." Indeed, EchoStar started from humble beginnings right out of the pages of Popular Mechanics magazine. Mr. Ergen, a Tennessean, would travel around with his wife, Candy, and his gambling partner, James DeFranco, trying to sell the original satellite dishes to rural customers without access to cable television in rural areas of Colorado, Utah and Wyoming. At that time it was not called the "BUD business" for nothing: The big ugly dishes were often as large as a child's wading pool, but they were accepted because they were the only way to get a good picture and the neighbors were too far to complain.

But the business could only go so far. Convinced he could compete against cable operators, Mr. Ergan raised $335 million in junk bonds in the early 1990's to finance his bid to build a system that would allow him to sell the now familiar pizza-size receiving dishes that adorn the sides of houses around the country. He took the company public in 1995.

Despite an infusion of cash from the initial public offering, Mr. Ergen still found himself outmaneuvered by the cable television companies. In 1997, Mr. Ergen sought to put EchoStar on an equal footing by arranging a partnership with the News Corporation. Mr. Murdoch, however, killed the deal as opposition to the transaction in Washington mounted.

Mr. Ergen turned the moment into an opportunity. He sued the News Corporation for $5 billion for breach of contract and ended up buying its satellite assets in the United States, gaining the last of the three orbital slots available to serve the nation.

And his standing within the industry swelled.

"In my dealings with Ergen," said Barry Diller, the chairman of USA Networks, "he's been direct and nononsense. No games.

"He's not part of any club I know," Mr. Diller added. "He is unpredictable as all hell and that's refreshing."

Mr. Ergen, a certified public accountant who once worked for Frito-Lay, is also a notorious penny-pincher.

At EchoStar, he not only requires many employees to double up in hotel rooms and take the red eye to keep expenses down, he even does so himself. He bought the company's

A would-be TV power broker makes his move.

original office, in a strip mall, out of bankruptcy. And he has even been stingy with his investment bankers, who are used to living well at their client's expense. He refused to sign a retainer agreement with UBS Warburg until he renegotiated the fee down.

"When it comes to spending money," Mr. Ergen replied to a question from a reporter yesterday, "I have a memory lapse."

EchoStar picked up more momentum but it continued to lose lots of money. Mr. Ergen concluded that the satellite industry could never be a viable competitor to cable as long as he was forced to fight it out with the other big satellite operator, Hughes Electronics' DirecTV.

So when Mr. Ergen found out 18 months ago that the News Corporation was in talks to buy DirecTV from General Motors, which had decided to focus exclusively on automaking again, Mr. Ergen realized that he would never have another chance to consolidate the business under one banner unless he acted to block the bid. For months he talked with Wall Street investment banks about financing. He quietly approached G.M. with an offer. He was repeatedly spurned.

In early August, Mr. Ergen publicly disclosed his offer in hopes of forcing G.M. to take him seriously. Nonetheless, G.M.'s management and board remained inclined to make a deal with Mr. Murdoch.

The two biggest stumbling blocks for EchoStar were the distinct possibility the deal could be blocked by regulators and the company's lack of financing. And inside G.M. some executives questioned whether Mr. Ergen's bid was serious or just a negotiating ploy against Mr. Murdoch.

Early last week, General Motors decided to bring the situation to a head: it would vote to accept one of the two proposals before the weekend was over. But EchoStar still had not gotten the $5.5 billion loan it would need to finance the deal.

EchoStar's financial adviser, UBS Warburg made a deal with Deutsche Bank to loan EchoStar the money. But there was one problem: UBS Warburg's loan came with strings that could allow it out of the deal. G.M. rejected UBS Warburg's financing as inadequate. G.M. gave EchoStar until Saturday morning, before its board meeting, to come up with an adequate arrangement.

By that time, G.M.'s board was pulling for Mr. Ergen over Mr. Murdoch, if he could get his financing.

Saturday morning, Mr. Ergen still did not have the money. The board met in Manhattan with the intention of voting to take the News Corporation deal. Without a bank willing to finance him, Mr. Ergen decided to ante up his own money. He faxed a new proposal to the board late that afternoon offering his own stock as collateral until he could get the loan.

G.M.'s board decided to table its decision until Sunday to consider the new offer. Mr. Murdoch immediately made good on a threat to abandon his offer if a decision was not made that day.

Without a rival offer and with Mr. Ergen showing his own determination by putting his own money on the line, G.M. found itself with little choice but to accept EchoStar's bid.

Will it work, finally creating a healthy rival to the cable television giants? Even Mr. Ergen is not sure.

"History will show," he said, "that either this is one of the stupidest moves in business or one of the best."

Satellite vs. Cable, the Choices

Cable services are more popular than satellite services, but satellite companies have made significant inroads in some communities.

LARGEST METROPOLITAN AREAS	*Number of households*	*Percentage of households with cable*	*Percentage of households with satellite or other system*
New York	6,935,610	50.0%	23.5%
Los Angeles	5,354,150	67.6	15.9
Chicago	3,244,850	61.6	14.9
Philadelphia	2,703,480	54.9	26.1
San Francisco-Oakland-San Jose	2,431,720	57.1	30.3
AREAS WITH THE LARGEST PERCENTAGES OF CABLE SUBSCRIBERS			
Rochester-Mason City-Austin, Ill.	134,450	90.1%	8.3%
Burlington, Vt.-Plattsburgh, N.Y.	300,650	88.3	2.5
Colorado Springs-Pueblo, Colo.	298,600	84.3	10.1
Laredo, Tex.	57,270	84.0	6.0
Bowling Green, Ky.	76,180	83.1	5.9
AREAS WITH THE LARGEST PERCENTAGES OF SATELLITE SUBSCRIBERS			
Tampa-St. Petersburg, Fla.	1,507,790	52.8%	32.5%
Syracuse	361,650	54.7	32.1
New Orleans	636,340	55.9	30.9
San Francisco-Oakland-San Jose	2,431,720	57.1	30.3
Sacramento-Stockton-Modesto, Calif.	1,187,000	56.8	30.0

Source: Nielsen Media Research

The New York Times

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November 20, 2001

The Honorable John Ashcroft
Attorney General
Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

Re: EchoStar/Hughes Proposed Merger

Dear Attorney General Ashcroft:

I am deeply concerned about the recently proposed acquisition of Hughes Electronics by EchoStar Communications. If allowed to be completed, the merger will have a profound effect on the market for the provision of multichannel television and other important communication services. In my state, many areas do not have the option to receive cable television, so the merger will create a true monopoly. In other parts of my state, where cable is available, a serious reduction in choices will still occur. In both cases, the proposed acquisition is anti-competitive and detrimental to the welfare of consumers.

Nationwide, Hughes and its DirecTV unit owns 61.7% of the market for direct broadcast satellite (DBS) service, while EchoStar has 38.3% of that market.[1] Together, they would create a monopoly in the DBS market. This merger would also create a monopoly for multichannel services in areas where cable is not available because DBS and cable are the only viable options for this service.

Missouri has unique reason to be concerned. According to the U.S. Census, there are 2,442,017 housing units in Missouri.[2] But cable is an option in only 1,595,631, or two-thirds, of

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[1] Sources: Carmel Group, Morgan Stanley

[2] U.S. Census Bureau, Census 2000.

those units.[3] Therefore, the proposed acquisition will leave nearly 846,386 Missouri houses – one third of our citizens – to deal with a monopolist for DBS and multichannel television services.

Another problem associated with this acquisition is the reduction in competition in emerging technologies such as broadband Internet. Presently cable is the primary source for high-speed Internet access, with provision of that service by satellite a still nascent but growing option. Again, rural Missouri will be particularly impacted by the merger. There is a terrific disparity between urban and rural areas for Internet technology.[4] Yet such technology is important to economic development because it provides important business tools, such as videoconferencing, that factor into business decisions on where to locate. Allowing this acquisition would leave rural Missouri without this important service and create a market with little competitive incentive to provide the service. Thus rural Missouri will fall even further behind urban areas in the competition for economic development. Businesses are less likely to locate in areas where they do not have full access to the same tools as their urban competitors.

Furthermore, DBS technology is increasingly used to provide coverage of weather and disaster notices as well as important local, state and federal governmental meetings and information.[5] It also provides access to entertainment avenues such as sporting events, music, movies and movie trailers. Healthy competition for DBS subscribers is the best way to ensure that those services continue and grow. Without it, rural Missouri will have difficulty attracting and keeping residents who do not have the same access and quality of life that suburban and urban dwellers enjoy.

Other technologies cannot be counted on to gain acceptance or penetration in order to discipline prices and services through competition. In recent years, there has been talk of new technologies that would allow some of these services to be provided through telephone lines and other avenues. These options have yet to materialize with any significant degree of penetration.

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[3] National Cable & Telecommunications Association, Industry Statistics as of December 2000. This low rate of cable penetration places Missouri with states such as Alaska 65.92%, Kentucky 66.07%, New Mexico 63.68%, North Dakota 69.68% and Wyoming 64.84%, in terms of cable penetration rates.

[4] *Falling Through the Net: Toward Digital Inclusion; A Report on Americans' Access to Technology Tools*, October 2000, pg. xviii (rural areas are lagging behind cities and urban areas in broadband penetration, 7.3% penetration for rural areas, 12.2% for central cities and 11.85 for urban areas).

[5] i.e., FCC meetings

With the economy as it is, many plans to develop such technology have been abandoned or back-burnered.

Mergers to monopoly should be considered very carefully and allowed only in the most extreme conditions. Such conditions do not exist in this industry. The alarming level of concentration already extant in this area and the level that would be attained through this proposed acquisition, warrant a very critical review. If this merger is allowed to go through, we will almost surely create an environment where prices will rise, services will fall and innovation will stagnate, particularly in our rural areas.

This office is committed to a thorough investigation of the merger and its effect in Missouri. On behalf of the people of the State of Missouri, I urge the Justice Department to thoroughly review this proposal. In addition, we will be seeking contemporaneous access to the Hart-Scott-Rodino filings in this matter. As currently structured, I believe the merger requires Justice's intervention to protect consumers from a monopoly situation.

Sincerely,

Jeremiah W. "Jay" Nixon
Attorney General

cc: Charles James
Assistant Attorney General
Antitrust Division

NEWS

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OFFICE OF MISSOURI ATTORNEY GENERAL

Nov. 20, 2001

Nixon opposes monopoly on satellite service in rural Missouri

Jefferson City, Mo. — Attorney General Jay Nixon today said much of rural Missouri would be under the control of a monopoly for satellite television and broadband internet service if a proposed merger between the two companies that control 100 percent of the direct broadcast satellite market nationwide takes place.

In a letter to U.S. Attorney General John Ashcroft, Nixon says his office will investigate the merger of Hughes Electronics, owner of DirecTV, and Echostar Communications, owner of Dish Network. Nixon urged the Justice Department to intervene as well.

In his letter, Nixon pointed out that roughly one third of Missouri houses — mostly in rural areas — do not have the opportunity to connect with a cable system. Those 846,386 houses rely solely on direct broadcast satellite (DBS) service for multichannel television programming. If the merger is allowed to go through, Hughes and Echostar will control 100 percent of the DBS market in the state of Missouri. Such control would allow the new company to raise prices at will, cut service and neglect innovative products for customers.

Nixon says the merger also hurts rural Missouri's ability to access broad band internet service, an important and growing technology.

"Allowing this acquisition would leave rural Missouri without this important service and create a market with little competitive incentive to provide the service," Nixon said. "Thus rural Missouri will fall even further behind urban areas in the competition for economic development. Businesses are less likely to locate in areas where they do not have full access to the same tools as their urban competitors."

Missouri's antitrust law, contained in Chapter 416, prohibits attempts to monopolize and gives the Attorney General the authority to investigate such attempts and to bring an injunction to stop mergers that would create a monopoly.

[NOTE: Additional material submitted for the Hearing Record is not reprinted here but is available on the Internet or on file with the House Judiciary Committee. The material referred to is listed below.]

"Advanced Telecommunications In Rural America, The Challenge of Bringing Broadband Service to All Americans." U.S. Departments of Commerce and Agriculture. April, 2000, at *http://www.ntia.doc.gov/reports/ruralbb42600.pdf*, at page 19.

Declaration of Mr. Roger J. Rusch, U.S. Department of Justice expert, in *Satellite Broadcasting and Communications Association of America* v. *Federal Communications Association*, May 23, 2001.

EchoStar v. *DirecTV Enterprises, Inc.*, Amended Complaint, United States District Court for the District of Colorado, April 5, 2001.

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